RUNNING INDEX OF VOLUME IV.

Appendix of Exhibits.

EXHIBIT.		PAGES.
1	Northwestern's Answer in N. Y. Supreme Court....	1–9
2	Exception.....	10–14
3	Notice of Appeal to General Term....	15–20
4	Opinion of Truax, J., at N. Y. Supreme Court, Special Term.....	20–51
5	Opinion of N. Y. Supreme Court, General Term.....	54–59
6	Order of Affirmance at N. Y. Supreme Court, General Term.....	60–62
7	Judgment of Affirmance, N. Y. Supreme Court, General Term.....	63–69
8	Opinions of the N. Y. Court of Appeals	70–112
9	Remittitur Motion Papers at N. Y. Court of Appeals....	113–142
9a	Order Denying Motion to Amend the Remittitur.....	142a
10	Referee's Report before Final Judgment in N. Y. Supreme Court.....	143
11	Exceptions to said Referee's Report..	160–164
11a	Remittitur.....	164a
12	Order of March 10th, 1897, at N. Y. Special Term, making Judgment of N. Y. Court of Appeals the Judgment of the N. Y. Supreme Court..	165–166
12½	Proposed Final Judgment.....	752
13	Final Judgment in N. Y. Supreme Court	167–182
14	Notice of Entry of said Final Judgment	182

I.—Last Will and Codicils; Memoranda as to Same; Deed of Gift; Agreement to Convey Tomb; Releases; and Will of 1880.

Exhibit.		Pages.
15	Will of Daniel B. Fayerweather of October 6th, 1884	183-188
16	First Codicil of said Will of 1884	189-190
17	Second Codicil " " "	191-192
18	Third Codicil " " "	193-195
19	Fourth Codicil " " "	196-197
20	Deed of Gift	198-204
21	Executors' Agreement with the Testator's Widow to Convey to her his Tomb and Burial Lot at Woodlawn Cemetery, N. Y.	205-207
22	Agreement of said Widow, and of the next-of-kin, to wit, of Lucy J. Beardsley, Emma S. Fayerweather, and Mary W. Achter, to Release.	208-209
23	Releases of the Widow and next-of-kin	210-212
24	Will of 1880	213-218
25	Memorandum by Testator, upon making Will of 1884	219
26	Memorandum by Testator in making Will of 1884. No date	219
27	Memorandum by D. B. Fayerweather, October 6th, 1884. "This certifies, &c." "I trust my heirs," &c	220
28	Memorandum by D. B. Fayerweather, December 11, '84	220
29	Private Memorandum by D. B. Fayerweather, March 22, 1889, relating to Hampton and Lincoln	220

II.—Letters of Messrs. Fayerweather, Ritch, Vaughan and Parsons.

Exhibit.		Page.
30	Letter Thomas G. Ritch to D. B Fayerweather, November 3rd, 1890.....	221
31	Letter D. B. Fayerweather, November 13, 1890, to Thomas G. Ritch, asking for original Will and Codicils..	222
32	Letter (Hall & Vaughan) to Miss Joyce, November 13, 1890.....	222
33	Letter D. B. Fayerweather, November 13, 1890, "I have examined my Will," &c.....	223
33a	Letter Thomas G. Ritch to Miss Joyce, "Had two long talks with Vaughan," &c.....	224
34	Letter Thomas G. Ritch to D. B. Fayerweather November 14th, 1890.	225
35	Letter D. B. Fayerweather to H. B. Vaughan and F. B. Myrick, November 15, 1890.	226
36	Letter J. E. Parsons to F. R. Coudert, February 14, 1891.....	226
37	Consent by Counsel for the testator's widow to withdrawal of objections to Will and Codicils, Will of 1884, March 12th, 1891.....	227
38	Same by D. G. Rollins, counsel for next of kin, 1884, March 13, 1891.....	228
39	Order of Surrogate that said objections be withdrawn.....	229
40	Decree admitting Will to probate.....	230
41	Decree admitting Codicils to probate..	234
41a	Petition for Probate of Will of October 6, 1884, and Codicils.....	240—243
42	Letter of Thomas G. Ritch, December 13, 1890, urging him to discourage contest by widow and next of kin, to Judge M. B. Beardsley.....	243—244

EXHIBIT.		PAGE.
43	Letter of Thomas G. Ritch to Morris B. Beardsley, November 28, 1890, discouraging contest.....	242
44	Exhibit marked in N. Y. Supreme Court record as Oa., being memorandum containing "MORE INSTITUTIONS FOR BENEFIT".....	245
45	Agreement by Colleges to postpone the receipt of their legacies until widow and nieces are paid.....	245
46	Letter of Five Colleges to Executors threatening suit, May 8th, 1893....	248
47	Power of Attorney Lucy J. Beardsley, to M. B. Beardsley, March 13, 1891	249
48	Will and Codicil of Lucy Fayerweather, June 3rd, 1891.....	250
49	Deposition of John W. Wescott.....	255
50	Opinion of Pitney, V. C., of New Jersey, in Wright *v.* Wright.....	259—279
51	Affirmance by Court of Errors and Appeals of New Jersey.....	277—278
52	Opinion (Feb'y 5, 1901) of Lacombe, C. J., as to Judge Wescott's testimony.	278

III.—Power of Attorney of Widow of Testator; Opinions and Orders.

EXHIBIT.		
53	POWER OF ATTORNEY from LUCY FAYERWEATHER to J. B. REYNOLDS, June 4th, 1892.	279
54	Complainants' Exhibit 1, March 4th, 1901, C. B. Surrogate's certificate of Letters Testamentary to J. B. Reynolds as sole executor of Last Will and Codicil of Lucy Fayerweather, widow of testator.....	281—283

Exhibit.		Page.
55	Opinion October 22nd, 1898, of Lacombe, J., that the witness Butler must testify to contents of burned codicil	283—286
56	Order Oct. 24th, 1898, of Lacombe, J., directing witness Butler to testify to contents burned codicil	286
57	Order Oct 31st, 1898, of Lacombe. J., committing witness Butler for contempt	287
58	Opinion of U. S. Court of Appeals on Butler Writ of Error	288—293
59	Order, January 12th, 1899, of U. S. Court of Appeals reversing decision that Butler disclose contents of burned codicil	294—295
60	Order, January 19th, 1899 of Lacombe, J., on Mandate of U. S. Court of Appeals, as to Butler	295—298
61	Receipt, April 18th, 1893, of Arnoux, Ritch & Woodford, for the Will and Codicils of D. B. Fayerweather of 1884	299
62	Ruling of Lacombe allowing testimony to stand	300—301
63	Will of D. B. Fayerweather of 1878	302—308

IV.—Proofs that the Defendant Colleges are charitable, literary, or scientific corporations.

Exhibit.		Page.
64	Charter of Amherst College	309—315
65	Charter of Bowdoin College	316—325
66	Charter of Williams College	326—332
67	Charter of Dartmouth College	332—348
68	Charter of Columbia College	348—364
69	Charter of University of Rochester	365—370
70	Charter of Hamilton College	371—377

EXHIBIT.		PAGE.
71	Page 908 and 909 State Court Record Concession on Trial before Justice Truax that certain colleges and institutions were qualified to receive bequests	378—380
72	Title pages of the Laws of Ohio 1825 and 1826, and pages 93, 94 and 95, being the Charter of the Western Reserve College, &c. (Adelbert)..... . ..	380—385
73	Charter of Wabash College.....	385—391
73½	Charter of Marietta College.....	391—395
74	Charter of Hampton Normal and Agricultural Institution.....	396—402
75	Charter of Wesleyan University.....	403—410
76	Charter of Cornell University.....	410—422
77	Charter of Yale College.....	423—432
78	ADDRESS before Justice Truax of Supreme Court BY J. E. PARSONS, with testimony introducing same.....	432—445
79	Stipulation that Lafayette is a literary and scientific corporation.....	445
80	Charter of Union Theological Seminary	446—448

V.—Photographs of testator's signatures; and of his ALLEGED signature.

EXHIBIT.		
81	Photograph of the signature to the Will of D. B. Fayerweather, dated October 6, 1884, and of all codicils EXCEPT THE BUTLER CODICIL ler codicil of November 11th, 1890.....	449
82	Photograph of endorsement on codicil of November 15th, 1890.....	450
83	Enlarged photograph of signature of D. B Fayerweather to codicil of November 15, 1890.....	451
84	Photograph of part of codicil of November 15th, with signature of all parties present	452

VI.—Extracts from the Surrogate's Record upon Probate of Will and Codicils of Daniel B. Fayerweather.

Exhibit.		Page.
85	Extracts from Elizabeth R. Joyce's Surrogate Testimony	453—469
86	Extracts from Thos. G. Ritch's Surrogate Testimony	469—495
87	Extracts from Bradford W. Hitchcock's Surrogate Testimony	495—500
88	Extracts from Dr. Maus R. Vedder's Surrogate Testimony	501—517
89	Extracts from Dr. Raynold W. Wilcox's Surrogate Testimony	518—520
90	Extracts from Edward M. Grout's Surrogate Testimony	521- 533
91	Extracts from remarks of Ex-Judge Rollins' Surrogate Record	533—535
92	Extracts from Henry B. Vaughan's Surrogate Testimony	535—557
93	Extracts from Rev. Dr. Wm. Lloyd's Surrogate Testimony	558—559
94	Extracts from Stewart L. Woodford's Surrogate Testimony	560—569

VII.—Extracts from Record of Amherst vs. Ritch.

Exhibit.		Page.
95	Testimony of Thos. G. Ritch before Justice Truax	569—580
96	Testimony of Henry B. Vaughan before Justice Truax	581—598
97	Testimony of Haley Fiske before Justice Truax	599
98	Testimony of Prescott Hall Butler before Justice Truax	600
99	Testimony of Justus L. Bulkley before Justice Truax	600—602

VIII.—Opinions; Memoranda; Stipulations; and Orders.

Exhibit.		Page.
100	Opinion of Lacombe, J., as to abridging record by Examiner	602—603
101	Opinion of April 3rd, 1899, of Lacombe, allowing proofs for Bill to be used for Cross-Bill	604
102	Memorandum of July 13th, 1900, of Lacombe, J., as to Order in regard to Proofs for the Bill being used for Cross-Bill	605
103	Memorandum of Aug. 22nd, 1900, directing Orders to be handed up	605
104	Opinion of Dec. 27th, 1900, of Lacombe, J., as to Answering certain questions	606
105	Opinion of January 30th, 1901, of Lacombe, J., as to Reading in Hamilton's Proofs for Other Defendants	608
106	Opinion of Lacombe, J., as to Myrick and Vaughan Answering certain questions	609
107	Opinion of Aug. 12th, 1901, of Lacombe, J., as to Justice Truax's testimony herein	610
108	Order of April 5th, 1902, of Lacombe, J., as to Closing Defendants' Proofs	611
109	Order of Aug. 12th, 1897, of Lacombe, J., for service of Process upon Non-resident Defendant Corporations	612—613
110	Order of Sept. 7th, 1898, of Lacombe, J., Setting Aside Service of Process upon Lincoln University	614
111	Order of Oct. 31st, 1898, of Lacombe, J., as to One Return upon Appeal from Injunction	615

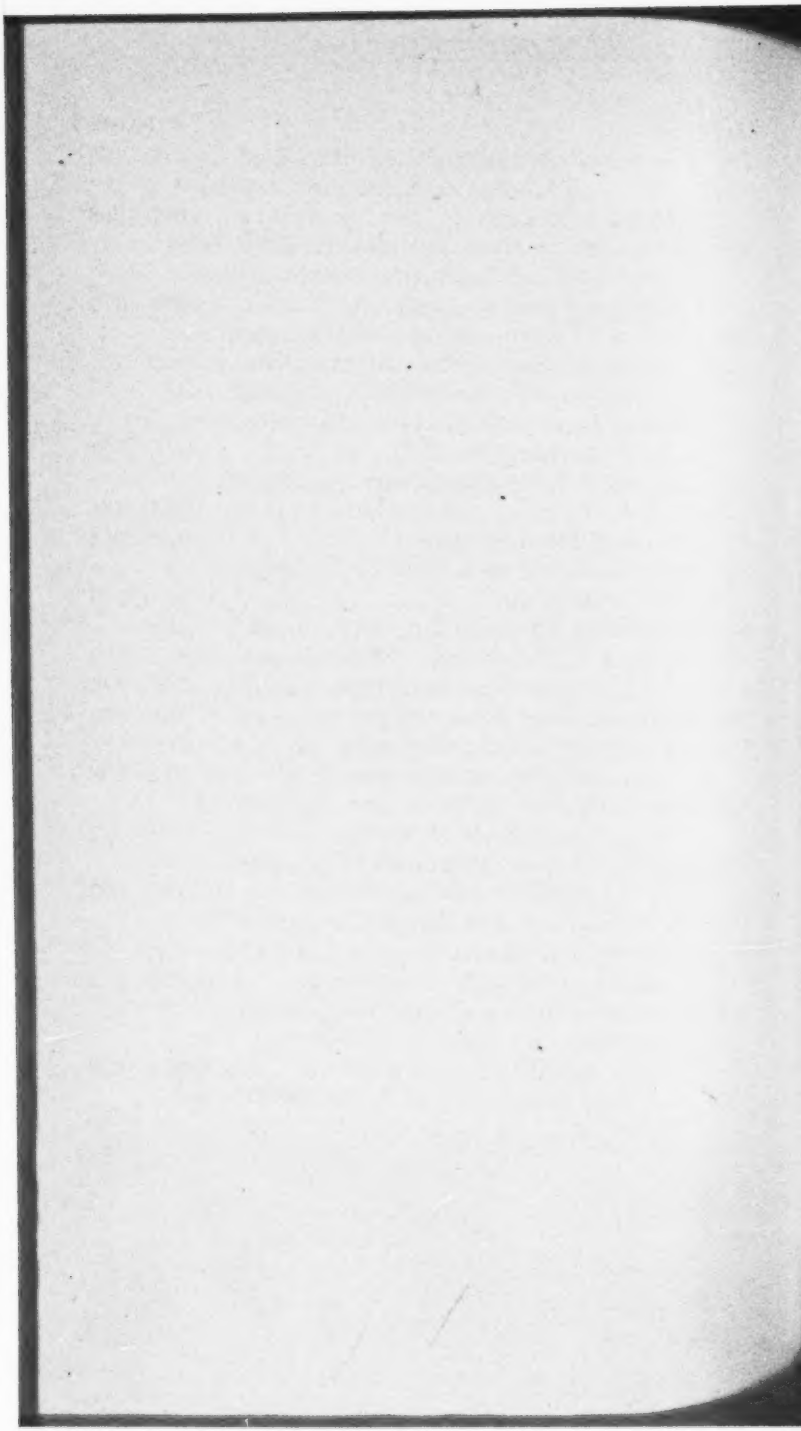
EXHIBIT.		PAGE.
112	Order of April 5th, 1899, of Lacombe, J., that this Cause, upon Bill and Cross-Bill, be heard as one, and that Proofs of Complainants to Bill be used in support of the Cross-Bill.	616—617
113	Order of May 15th, 1899, of Lacombe, J., that one copy of Record on Appeal to N. Y. Court of Appeals suffice as Hamilton's proof of same, as well as if it had been printed and served upon all.....	618
114	Order of May 31st, 1899, of Lacombe, J., setting aside Service of Process upon Park College.....	619—620
115	Order of July 1st, 1899, of Lacombe, J., AMENDING Bill.....	624
116	Order of July 23rd, 1900, of Lacombe, J., sustaining Hamilton's Plea to Amended Bill	624
117	Order of July 23rd, 1900, of Lacombe, J., sustaining Plea of the Executors to Amended Bill.....	625
118	Memorandum that REPLICATIONS were filed to Pleas of Executors, both to Bill and to Cross-Bill. Also Memorandum that July 23rd, 1900, a similar Order was made by Lacombe, J., sustaining Pleas of Presbyterian Hospital, Wesleyan University, Cornell University, Marietta College, Yale University, St. Luke's Hospital and Dartmouth College to Bill and Cross-Bill, and allowing Replications thereto, which were duly filed.....	626
119	Order of Aug. 31st, 1900, of Lacombe, J., sustaining Exceptions to Plea of Amherst College, and allowing Amherst to file a new Plea to the Amended Bill like Hamilton's, and adopting Hamilton's record; similar Order as to Williams and Union Theological Seminary.....	627—628

EXHIBIT.		PAGE.
120	Order of January 14, 1901, dismissing Amended Bill as to Hamilton.....	629
121	Order of Jannary, 30th, 1901, of Lacombe, J., that any party may use Hamilton's proof; that Hamilton may use it as to Cross-Bill, and as to her election	630
122	Memorandum as to Order of Lacombe, J., that Lafayette be deemed to have pleaded like Hamilton.....	632
123	Order of April 5th, 1901, of Lacombe, J., as to using but one copy of Hamilton record on final hearing.....	633—634
124	Order of May 6th, 1901, of Lacombe, J., allowing cross-examination of Edward M. Grout.....	835—636
125	Notice to take deposition of Albion M. Dyer, May 13th, 1901.....	636—638
126	Order of July 18th, 1901, of Lacombe, J., as to abridging the Record.....	639—641
127	Order of July, 1901, of Lacombe J., as to service of process upon defendants to Cross Bill.....	642—643
128	Order of July, 1901, of Lacombe, J., that Testimony of Thos. Marsac stand	644—645
129	Order of Aug. 21st 1901, of Lacombe, J., that Examiner abridge proofs.....	646—647
130	Order of Aug. 21st, 1901 of Lacombe, J., denying motion to set aside decree sustaining Plea of Hamilton College to Amended Bill.....	648—549
131	Stipulation of Dec. 4th, 1901, that Woman's Hospital plead like Hamilton	650—651
132	Order of Feby. 3rd, 1902, of Lacombe, J., enlarging complainant's time to take proofs.....	652—653
133	GENERAL ORDER of May 16th 1902, as to ALL PLEADINGS AND RECORDS....	657—664
134	Stipulation that Columbia adopts the proofs used by Ritch, Bulkley & Vaughan herein.....	665—666

EXHIBIT.		PAGE.
135	Election of Adelbert College to adopt Hamilton's record as to Bill and Cross Bill	667—668
136	Exceptions to cross-questions in Com. plainants, and direct questions in Defendants' proofs	669—693
137	MOTION TO EXPUNGE FROM THIS RECORD and strike out RECORD OF FIVE COLLEGE ACTION (Amherst *vs.* Ritch) made in argument before Lacombe, J., June 18th, 1902	694
138	Complaint in Reynolds, Exr. *v.* Ritch *et al*	695—751
139	Proposed Final Judgment	752—774
140	Opinion of Aug. 27th, 1902, of Lacombe, J.—Sustaining Pleas	775
141	Opinion of October 7th, 1902, of Lacombe, J., as to Form of Final Decree	776
142	FINAL DECREE, Oct. 10th, 1902	777—783
143	COMPLAINANTS' ASSIGNMENTS OF ERROR	784—810
144	CROSS-COMPLAINANT Reynolds, as Sole Executor's ASSIGNMENTS OF ERROR	811—838
149	COMPLAINANTS' APPEAL and ALLOWANCE; and Proofs of Service	839—847
150	CITATION upon COMPLAINANTS' APPEAL; and Proofs of its Service	847—855
151	CROSS-COMPLAINANT Reynolds, as Sole Executor's, APPEAL AND ALLOWANCE; and Proofs of Service	856—864
152	CITATION upon CROSS-COMPLAINANT Reynolds, as Sole Executor's Appeal; and Proofs of its Service	864—872
123	CERTIFICATE of Clerk of U. S. Circuit Court	873

Bond upon Complainant's Appeal to the Supreme Court of the United States herein... 873-877

Bond upon Cross-Complainant's Appeal to the Supreme Court of the United States herein. 877-881



APPENDIX OF EXHIBITS.

SUPREME COURT OF THE STATE OF NEW YORK.

NEW YORK COUNTY.

THE TRUSTEES OF AMHERST COLLEGE, THE TRUSTEES OF DARTMOUTH COLLEGE, HAMILTON COLLEGE, UNIVERSITY 1 OF ROCHESTER, THE PRESIDENT AND TRUSTEES OF WILLIAMS COLLEGE, Plaintiffs. *against* THOMAS G. RITCH, JUSTUS L. L. BULKLEY and HENRY B. VAUGHAN, individually and as Executors of the Last Will and Testament and Codicils of DANIEL B. FAYERWEATHER, deceased, NORTHWESTERN UNIVERSITY and others, Defendants.	**Amended Answer of Northwestern University.**

2 The defendant Northwestern University, answering the complaint herein by Redding & Kiddle, its attorneys, respectfully shows to this Court:

First.—It admits that it is a foreign corporation, organized under the laws of the State of Illinois.

Second.—On information and belief, it admits, and so avers, that on or about the 15th day of November, 1890, Daniel B. Fayerweather departed this life at the City of New York, leaving a last will and testament together with four codicils thereto, and which said last will and testament and the codicils thereto have been duly admitted to probate by the Surrogate of the County of New

York, as set forth in the complaint herein; that a decree adjudging the said instruments to have been properly executed, and admitting the same to probate, and establishing the same as the last will and testament and codicils of the said Daniel B. Fayerweather, deceased, and directing that the same be recorded, and that letters testamentary issue thereon to the executors therein named, was entered in the office of the Clerk of the said Surrogate on the 24th day of March, 1891, and that thereafter, on the 25th day of March, 1891, letters testamentary were issued by the said Surrogate to the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, as
3 executors of the said last will and testament and codicils of the said Daniel B. Fayerweather, deceased; that the said defendants duly qualified as such executors, and entered upon, and have been ever since performing their duties as such executors; and that the exhibits marked respectively, Exhibits A, B, C, D, and E, annexed to the complaint herein, are copies of the said last will and testament and all the codicils thereto.

Third. On information and belief it admits and so avers that the said defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan on the 24th day of February, 1891, made, executed and delivered in due form of law a deed of gift in writing, under and by
4 which this defendant is given the sum of one hundred thousand dollars ($100,000) out of the residuary estate devised and bequeathed to them in and by the said last will and codicils of said Daniel B. Fayerweather and of which said deed of gift "Exhibit F", annexed to the complaint herein, is a copy, as defendant is informed and believes.

Fourth. On information and belief it admits, and so avers that on or about the 12th day of June, 1891, Lucy Fayerweather. now deceased, late the widow of Daniel B. Fayerweather, deceased (the executors of the estate of said Lucy Fayerweather being parties defendant in this

suit), and the said defendants Mary W. Achter and Eleanor S. Drury (now Emma S. Fayerweather), the next of kin of said Daniel B. Fayerweather, deceased, severally made, executed and delivered in due form of law, general releases in writing under their respective hands and seals, in and whereby, for themselves and their respective heirs, executors and administrators, they severally remised, released and forever discharged the said defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, as executors and trustees of the estate of said Daniel B. Fayerweather, deceased, as individuals and as representatives of the donees, including this defendant, constituting a class named in the aforesaid deed of gift, and also the persons and corporations, including this defendant, named as donees in the said deed of gift, and also the legal successors, assigns, heirs, executors and administrators of all the aforesaid persons and corporations, including this defendant, of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, claims and demands whatsoever in law or in equity which against the said persons or corporations or any of them, including this defendant, they ever severally had, or which they or their respective heirs, executors or administrators thereafter should, could or might have, for, upon or by reason of any matter, cause or thing whatsoever (except for the respective amounts given to them severally by the said will and codicils of Daniel B. Fayerweather, deceased, and the additional amounts provided beforehand to be given to them by the said Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan out of the residuary estate of Daniel B. Fayerweather, deceased, and which said general releases were made, executed and delivered for and in consideration of the payment to the said sevesal releasors named, by the said Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, of additional large sums of money out of the residuary estate of said Daniel B. Fayerweather, deceased, over and above the amounts severally given to them by

the said Daniel B. Fayerweather in and by his said last will and codicils, as by the said several releases and other instruments in writing or duly authenticated copies thereof in court to be produced will more fully and at large appear; and which said additional amounts so provided to be paid by the said Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, or so much thereof as the said Lucy Fayerweather, now deceased, and the said defendants Mary W. Achter, Eleanor S. Drury (now Emma S. Fayerweather), and the executors of the estate of said Lucy Fayerweather, deceased, are at this time entitled to receive, the said Lucy Fayerweather, de-
7 ceased, and the said defendants have received, and the said defendants still retain and have not returned or restored the same or any part thereof, and have not made any sufficient, valid, legal or binding offer or tender of the said sums so received by them as aforesaid, or any part thereof, to the said defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, or to any person whatsoever; wherefore, the said releasors have not now any claim or right to claim any further or other part of the residuary estate of said Daniel B. Fayerweather, deceased.

Fifth.—This defendant, further answering, shows to this Court that neither the plaintiffs in this action
8 nor any of them, as appears by the complaint herein, nor the said defendants John B. Reynolds and Morris B. Beardsley, as executors of the estate of Lucy Fayerweather, deceased, Mary W. Achter and Emma S. Fayerweather, as appears by their answer herein, nor any of the other defendants in this action, as this defendant is informed and believes, have any wish to dispute or interfere with the payment by the said Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, as executors, trustees or residuary legatees under said will and codicils of said Daniel B Fayerweather, deceased, of the said sum of one hundred thousand dollars ($100,000) given by the said Thomas G. Ritch, Justus L. Bulkley and Henry B.

Vaughan to this defendant in and by the aforesaid deed of gift, and recommended so to be given to this defendant by the said Daniel B. Fayerweather, in his lifetime in and by the paper writing referred to in the complaint herein as "Private Memorandum" of said Daniel B. Fayerweather, signed by him and dated March 22d, 1889; and that neither the plaintiffs in this action, nor any of them, nor the said defendants John B. Reynolds and Morris B. Beardsley, as executors of the last will and testament of said Lucy Fayerweather, deceased, Mary W. Achter and Emma S. Fayerweather, nor any of the other defendants in this action, as defendant is informed and believes, make or desire to make any claim to the said amount or sum of one hundred thousand dollars ($100,000), or any part thereof, which this defendant is entitled to receive as aforesaid (but which it has not received nor any part thereof), either as donee under the said deed of gift or as *cestui que* trust under the trusts alleged in the complaint herein to have been created by the said Daniel B. Fayerweather in and by virtue of his said last will and testament, and the codicils thereof, and the other paper writings of said Daniel B. Fayerweather mentioned in the complaint herein; and the said persons and corporations named as plaintiffs and defendants in this action comprise all of the persons and corporations who are or may be entitled to claim or receive, as this defendant is also informed and believes, any part of the estate of said Daniel B. Fayerweather, deceased, in any event.

Sixth.—This defendant, further answering avers, on information and belief, that the aforementioned last will and testament, and the four codicils thereto, of the said Daniel B. Fayerweather, deceased, contain and comprise the whole of the said testator's testamentary disposition of all of his property, both real and personal, and have been duly admitted to probate by the Surrogate of the County of New York, and established as in all respects valid and binding, as aforesaid; and that the said last

will and testament, and the four codicils thereto, so duly admitted to probate and established, and the testamentary disposition of the property of the said Daniel B. Fayerweather evidenced thereby are not in violation, either in whole or in part of any of the provisions of Chapter 360 of the Laws of 1860, of the State of New York, or of any other statute or law of the said State of New York.

Seventh.—This defendant, further answering, denies that it has any knowledge or information sufficient to form a belief as to any and all of the other allegations in the complaint contained not hereinbefore admitted or denied.

11

Wherefore, this defendant prays the judgment of this Court;

First.—That it be adjudged and decreed that this defendant Northwestern University is entitled to receive and to be paid out of the estate of the said Daniel B. Fayerweather the said sum of one hundred thousand dollars ($100,000) with interest.

Second.—That the said defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, executors and trustees of the estate of Daniel B. Fayerweather, deceased, be ordered to pay to this defendant out of

12 the estate of said Daniel B. Fayerweather the aforesaid sum of one hundred thousand dollars ($100,000) with interest.

Third.—That the ultimate rights of this defendant and of the other parties plaintiff and defendant to this action, in and to the estate of said Daniel B. Fayerweather, deceased, be determined and enforced by the judgment in this action in accordance with the allegations of this answer, and the prayers of the defendant herein set forth, and as the principles of equity may require.

Fourth.—That this defendant may have such other and

further relief herein as may be just and equitable, and that its costs and disbursements herein be paid as the Court may direct.

REDDING & KIDDLE,
Attorneys for Northwestern University,
Office and Post-office address,
No. 38 Park Row,
New York City.

13

14

STATE OF NEW YORK,
City and County of New York. }

Alfred W. Kiddle, being duly sworn, deposes and says that he is one of the attorneys for the defendant Northwestern University in this action, and that he resides in the City and County of New York; that he has read the foregoing answer, and knows the contents thereof; that the same is true to the knowledge of this deponent except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the grounds of his belief as to all matters therein stated upon his knowledge are derived as follows:

From an examination of the papers and records in the Surrogate's Court of the County of New York in the contest proceedings over the probate of the will and codicils of said Daniel B. Fayerweather, deceased; from interviews with the attorneys for the executors of said estate, and of other defendants herein, and others, and from his connection as one of the attorneys for the Northwestern University in the suit brought by the defendant John B. Reynolds and others against the defendant Thomas G. Ritch and others, in this Court, and all the proceedings therein.

Deponent further says that the reason why this verification is not made by the defendant Northwestern University is that the said defendant is a corporation of the State of Illinois, whose principal place of business is at Evanston in the said State of Illinois, and said corporation has not an office and does not transact any business nor do any of its officers reside in this county, where deponent resides.

ALFRED W. KIDDLE,

Sworn to and subscribed before me
this 14th day of October, A. D., 1893.

ELLA M. TAYLOR,

Commissioner of Deeds,

New York County.

17

18

SUPREME COURT,

NEW YORK COUNTY.

THE TRUSTEES OF AMHERST COLLEGE and others,
Plaintiffs,
against
19 THOMAS G. RITCH and others,
Defendants.

Exhibit II, Exception.

Pursuant to the provisions of Section 1022 of the Code of Civil Procedure, as amended in the year 1894, the defendants John B. Reynolds and Morris B. Beardsley, as executors of the last will and codicil of Lucy Fayerweather, deceased, and the defendants Mary W. Achter and Emma S. Fayerweather, hereby severally except to the decision herein, filed in the office of the Clerk of the City and County of New York, December 31, 1894, and to each and every part of said decision.

20 They also severally except to the judgment entered in said Clerk's office, December 31, 1894, upon said decision, and to each and every part of said judgment.

Dated New York, January 8, 1895.

WILLIAM BLAIKIE,

Attorney for said Defendants,

No. 206 Broadway,

New York.

To Messrs. PUTNEY & BISHOP,
Attorneys for Plaintiffs, 115 Broadway, New York.

Mr. Wm. Henry Arnoux,
For Defendant Thomas G. Ritch, individually and as Executor, &c., 18 Wall Street, New York.

Messrs. Arnoux, Ritch & Woodford,
For Defendants Cornell University, Marietta College and Elmira College, 18 Wall Street, New York.

Messrs. Parsons, Shepard & Ogden,
For Defendants Justus L. Bulkley and Henry B. Vaughan, individually and as Executors, &c., Maryville College and Wabash College, 111
21 Broadway, New York.

Messrs. G. G. & F. Beynolds,
For Defendant Wesleyan University, 16 Court Street, Brooklyn, N. Y.

Messrs. Redding & Kiddle,
For Defendant Northwestern University, 38 Park Row, New York.

Messrs. Butler, Stillman & Hubbard,
For Defendants President and Trustees of Bowdoin College, 54 Wall Street, New York.

22 Messrs. Robinson, Biddle & Ward,
For Defendants The University of Pennsylvania and Haverford College, 160 Broadway, New York.

Messrs. Adams & Comstock,
For Defendant The Union Theological Seminary, 36 Wall Street, New York.

Messrs. Chandler, Maxwell & Philip,
For Defendant The Trustees of Union College, 120 Broadway, New York.

Messrs. Owen, Gray & Sturgis,
For the Defendant The Eye and Ear Infirmary, 71 Wall Street, New York.

Mr. JOHN R. MACARTHUR,
For Defendant The Shattuck School, 18 Wall Street, New York.

Mr. JOHN M. PERRY,
For Defendant New York Cancer Hospital and The Peter Cooper Union, &c., 111 Broadway, New York.

Messrs. UNDERWOOD & STORKE,
For Defendant Wells College, 120 Genessee Street, Auburn, N. Y.

23 Mr. ROBERT E. TAYLOR,
For Defendant Vassar College, 275 Main Street, Poughkeepsie, N. Y.

Messrs. THORNTON, EARLE & KIENDL,
For Defendant Manhattan Dispensary, 108 Fulton Street, New York.

Messrs. HOPPIN & TALBOT,
For Defendants The Woman's Hospital, &c., and Brown University, &c., 111 Broadway, New York.

Messrs. JULIUS J. & A. LYONS,
24 For Defendant The Montefiore Home, 140 Nassau Street, New York.

Messrs. POWELL & KROPF,
For Defendant The Manhattan Eye and Ear Hospital, 120 Broadway, New York.

Messrs. LOCKWOOD & HILL,
For Defendant Trinity College, 115 Broadway, New York.

Mr. GEORGE S. INGRAHAM,
For Defendant The Methodist Episcopal Hospital, 44 Court Street, Brooklyn.

Messrs. Bristow, Peet & Opdyke,
For Defendant The University of the City of New York, 20 Nassau Street, New York.

Messrs. DeForest Brothers,
For Defendant The Presbyterian Hospital, 62 William Street, New York.

Mr. Wager Swayne,
For Defendant Layfayette College, 120 Broadway, New York.

Mr. Haley Fiske,
25 For Defendants The Trustees of Rutgers College, &c., and the President and Fellows of Yale College, &c., 1 Madison Avenue, New York.

Messrs. Hoadley, Lauterbach & Johnson,
For Defendant Mt. Sinai Hospital, 22 William Street, New York.

Mr. Clark Brooks,
For Defendant Park College, 54 William Street, New York.

Messrs. Alexander & Green,
For Defendant the Trustees of the College of New
26 Jersey, &c., 120 Broadway, New York.

Messrs. Brownell & Lathrop,
For Defendant Barnard College, 71 Wall Street, New York.

Messrs. Evarts, Choate & Beamam,
For Defendants The President and Fellows of Harvard University, 52 Wall Street, New York.

Messrs. Miller & Wells,
For Defendant The St. Vincent Hospital, 32 Nassau Street, New York.

Mr. Stephen P. Nash and Mr. J. McL. Nash,
For Defendants The Trustees of Columbia College, 67 Wall Street, New York.

Mr. William Bard McVickar,
For Defendant St. Luke's Hospital, 67 Wall Street, New York.

Messrs. Hornblower, Byrne & Taylor,
For Defendant Lincoln University, 45 William Street, New York.

Mr. Robert C. Taylor,
For the Rector and Visitors of the University of Vir-
27 ginia, 253 Broadway, New York.

Messrs. Scott & Upson,
For the Adelbert College of the Western Reserve University, 59 Wall Street, New York.

Austin Abbott,
For the Hampton Normal and Agricultural Institution, 32 Nassau Street, New York.

Byram L. Winters,
For Anner Amelia Reynolds, 206 Broadway, New York.

28 Henry D. Purroy,
Clerk of the City and County of New York, County Court House, New York, N. Y.

SUPREME COURT,

NEW YORK COUNTY.

THE TRUSTEES OF AMHERST COLLEGE and others.
Respondents,
against
JOHN B. REYNOLDS and MORRIS B. BEARDSLEY, as Executors of the Last Will and Codicil of Lucy Fayerweather, deceased, and MARY W. ACHTER and EMMA S. FAYERWEATHER,
Appellants.
Impleaded with THOMAS G. RITCH and others.

Exhibit III,
Notice of Appeal
to the General Term.

The above named defendants John B. Reynolds and Morris B. Beardsley, as executors of the last will and codicil of Lucy Fayerweather, deceased, and the above named defendants Mary W. Achter and Emma S. Fayerweather, severally hereby appeal to the General Term of the Supreme Court of the State of New York, in the First Judicial Department, from the judgment entered in this action in the Clerk's office of New York County, December 31, 1894, and each and every part of said judgment.

Dated New York, January 8, 1895.

WILLIAM BLAIKIE,
Attorney for said Appellants,
No. 206 Broadway, N. Y.

To Messrs. PUTNEY & BISHOP,
Attorneys for Plaintiffs, 115 Broadway, New York.

To Mr. Wm. Henry Arnoux,
For Defendant Thomas G. Ritch, individully, and as Executor, &c., 18 Wall Street, New York.

Messrs. Arnoux, Ritch & Woodford,
For Defendants Cornell University, Marietta College and Elmira College, 18 Wall Street, New York.

Messrs. Parsons, Shepard & Ogden,
For Defendants Justus L. Bulkley and Henry B. Vaughan, individually and as Executors, &c., Maryville College and Wabash College, 111
31 Broadway, New York.

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22

Messrs. Robinson, Biddle & Ward,
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Messrs. Adams & Comstock,
For Defendant The Union Theological Seminary, 36 Wall Street, New York.

Messrs. Chanler, Maxwell & Philip,
For Defendant The Trustees of Union College, 120 Broadway, New York.

Messrs. Owen, Gray & Sturgis,
For Defendant The New York Eye and Ear Infirmary, 71 Wall Street, New York.

To Mr. JOHN R. MCARTHUR,
For Defendant The Shattuck School, 18 Wall Street, New York.

Mr. John M. PERRY,
For Defendant New York Cancer Hospital and The Peter Cooper Union, &c., 111 Broadway, New York.

Messrs. UNDERWOOD & STORKE,
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33 Mr. ROBERT E. TAYLOR,
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Messrs. THORNTON, EARLE & KIENDL,
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Messrs. JULIUS J. & A. LYONS,
34 For Defendant The Montefiore Home, 140 Nassau Street, New York.

Messrs. POWELL & KROPF,
For Defendant The Manhattan Eye and Ear Hospital 120 Broadway, New York.

Messrs. LOCKWOOD & HILL,
For Defendant Trinity College, 115 Broadway, New York.

Mr. GEORGE S. INGRAHAM,
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Messrs. Bristow, Peet & Opdyke,
For Defendant The University of the City of New York, 20 Nassau Street, New York.

Messrs. DeForest Brothers,
For Defendant The Presbyterian Hospital, 62 William Street, New York.

Mr. Wager Swayne,
For Defendant Lafayette College, 120 Broadway, New York.

Mr. Haley Fiske,
35 For Defendants The Trustees of Rutgers College, &c., and the President and Fellows of Yale College, &c., 1 Madison Avenue, New York.

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For Defendant St. Luke's Hospital, 67 Wall Street, New York.

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For Defendant Lincoln University, 45 William Street, New York.

Mr. ROBERT C. TAYLOR,
For the Rector and Visitors of the University of Vir-
37 ginia, 253 Broadway, New York.

Messrs. SCOTT & UPSON,
59 Wall Street, New York, Attorneys for the Adelbert College of the Western Reserve University.

AUSTIN ABBOTT,
32 Nassau Street, New York, Attorney for the Hampton Normal and Agricultural Institution.

BYRAM L. WINTERS,
206 Broadway, New York, Attorney for Anner Amelia Reynolds.

38 HENRY D. PURROY,
Clerk of the City and County of New York, County Court House, New York, N. Y.

NEW YORK SUPREME COURT.

THE TRUSTEES OF AMHERST COLLEGE and others
against
THOMAS G. RITCH and others.

Exhibit 4.

Opinion at Special Term.

39

TRUAX, *J.*—On the 6th of October, 1884, Daniel B. Fayerweather made his last will and testament. After making various provisions for relatives, friends and certain charitable institutions, he, in the ninth clause of his will, bequeathed $2,100,000 in varying amounts to plaintiffs and the fifteen other institutions of learning mentioned in that clause, and gave to his executors power and authority in their discretion to withhold or reduce the amounts given to any of said institutions in case the conditions and circumstances of any of said institutions should be so changed as to render it inexpedient to pay all or any portion of said legacies to such institution. The rest, residue and remainder of his estate, both real and personal, he gave, devised and bequeathed, by
40 the 10th clause of his will, to his executors, in trust, to convert the same into cash and to divide the same equally among the institutions mentioned in the ninth clause of his will, share and share alike. He nominated and appointed the defendants Ritch and Bulkley executors of his will and trustees of his said estate. The will was drawn by the defendant Ritch, who was a lawyer.

At the time Mr. Fayerweather executed said will he gave to the defendant Ritch the following paper:

"New York, October 6, 1884. This certifies that I

have executed my will of this date, having been advised by my counsel of the provisions and restrictions of the law of this State relative to benevolent corporations. I trust my heirs will permit the provisions of this my will to be carried into effect. D. B. Fayerweather."

On the 13th day of December, 1884, Mr. Fayerweather executed a codicil to his said last will and testament, by which he revoked the tenth clause thereof, and by which he gave, devised and bequeathed all the rest and residue of his estate to said Bulkley and Ritch, "to them and their heirs forever." At the time he executed the
41 said codicil he gave to the said Ritch an envelope addressed "Mess. J. L. Bulkley and T. G. Ritch. To be opened in case of my death"; which envelope contained a paper in his own handwriting, of which the following is a copy:

"New York, December the 11, 1884.

Private Memorandum.

I have made Messrs. Bulkley and Ritch my residuary legatees in the confidence that thereby my intentions as expressed in my will shall be carried into effect and without litigations on the part of any person or persons interested. In case of my death I trust that they will take such steps by will or otherwise as will protect my
42 estate against the contingency of the death of either before my estate is settled and distributed.

D. B. Fayerweather."

Both the codicil and memorandum were prepared by or under the direction of Mr. Ritch after consultation with Mr. Fayerweather. On the said 13th day of December both of them were handed to Ritch for safe keeping.

On the 7th of January, 1888, Mr. Fayerweather made a second codicil to his will, by which he made certain bequests, and then nominated and appointed the defendant Vaughan as an executor of his will and trustee of his es-

tate, in addition to said Bulkley and Ritch, with the same powers and authority in every respect that were conferred on said Bulkley and Ritch, and also ratified and confirmed his said will and the first codicil thereto, except as therein modified. The codicil was also prepared by or under the direction of Mr. Ritch.

On or about the 22d day of March, 1889, Mr. Fayerweather executed another codicil, dated March 19, 1889; but this codicil made, as far as this case is concerned, no material change in the will or the other codicils. Mr. Ritch had a number of interviews with Mr. Fayerweather shortly prior to the execution of this codicil. At
43 these interviews Mr. Ritch produced the memorandum of December 11, 1884, and the envelope in which it was contained. At the time of the execution of this codicil Mr. Fayerweather made the following memorandum:

"PRIVATE MEMORANDUM.

Having made inquiries with regard to Hampton and Lincoln Universities, it is my judgment that the bequest to them should be withheld. I think the bequest to Cornell University should not exceed $100,000. If the North Western University at Evanston, Illinois, is in a prosperous condition, I would recommend that $100,-
44 000 be given to it. If the following persons are in my employ at the time of my death, I suggest that they receive the following sums: Rogers and Clark, $500 each; Gould, Campbell and Stone, $300 each, and Carpenter, $250; also James, who now opens and closes the store, $100; John Dickson, $200. I also wish that $1,000 be given Miss Joyce immediately after my decease, in addition to the provisions made for her by my will.

Mch. 22, 1889.

D. B. FAYERWATHER."

This memorandum was also given to Mr. Ritch for safe keeping.

On the 3d of November, 1890, Mr. Fayerweather wrote

to Mr. Ritch, requesting the latter to bring him the balance of the copy of his will, and on or about the 7th of November, Mr. Ritch gave Mr. Fayerweather copies of the second and third codicils.

On the 10th of November, 1890, Mr. Vaughan had an interview with Mr. Fayerweather. At that interview Mr. Fayerweather produced a copy of the will and of the codicil thereto, and Mr. Vaughan, at Mr. Fayerweather's request, read these papers aloud to him, and there was a discussion between them about the effect of the residuary devise contained in the codicils. Mr. Vaughan was ignorant of the three private memoranda hereinbefore re-
45 ferred to, but knew that Mr. Fayerweather wanted his property to go to certain institutions. As a result of the conversation between Mr. Fayerweather and Mr. Vaughan, Mr. Vaughan went to his own lawyer, who drafted another codicil to Mr. Fayerweather's will. This draft was taken by Mr. Vaughan to Mr. Fayerweather, who read and approved of it.

On the 11th of November this codicil was executed by Mr. Fayerweather and was put into the hands of Mr. Vaughan. It was, however, afterwards destroyed at the request of Mr. Fayerweather. It revoked the devise of the residuary estate to Messrs. Bulkley and Ritch and restored the tenth paragraph of the will.

On the 13th of November, 1890, Mr. Vaughan had
46 another interview with Mr. Fayerweather. At this interview two letters were prepared and signed by Mr. Fayerweather and given to Mr. Vaughan to deliver to Mr. Ritch. In one of the letters Mr. Fayerweather asked Mr. Ritch to deliver to Mr. Vaughan his original will and the first, second and third codicils thereto. This letter was delivered on the same day by Mr. Vaughan to Mr. Ritch, and Mr. Ritch gave to Mr. Vaughan the original will and the the first, second and third codicils. The other letter is as follows:

"11 East 57th Street, N. Y. City,
November 13, 1890.

Mr. Thomas G. Ritch: Sir:

I have examined my original will and the first, second and third codicils thereto handed by you to Mr. Vaughan at my request. By the tenth article of my will I left my residuary estate to my executors in trust, to be equally divided among certain corporations and institutions. By the first codicil it seems that I revoked this tenth article of my will, and then made the following disposition of my residuary estate: 'All the rest and residue of my estate, of whatsoever character and wheresoever situated the same may be, of which I shall die possessed and remaining after the provisions of the first nine paragraphs of my will have been fully complied with and carried
47 into effect, I give, devise and bequeath to Justus L. Bulkley and Thomas G. Ritch, named in the eleventh paragraph of my said will, to them and their heirs forever.' Please advise me at once in writing what is the effect of this clause, and to whom and how would my residuary estate go in case of my death, supposing the first codicil to remain in force.

Yours truly,

D. B. FAYERWEATHER."

In answer to this request Mr. Ritch dictated to his typewriter, while Mr. Vaughan was present, an answer, which he read to Vaughan. This answer is as follows:

"18 WALL STREET,
48 NEW YORK, November 14, 1890.

D. B. FAYERWEATHER, Esq.

DEAR SIR:

The intention of the change in question was to enable Messrs. Bulkley and myself to carry out the intentions of the will as modified by the various private memoranda in my possession. Neither Mr. Bulkley nor myself would have any moral right to treat any portion of your estate otherwise than as we know would conform to your wishes. I suggest that I call on you with these, and if still approved by you, that they be left in a sealed package with Miss Joyce or any one named by you.

The legal effect of the clause in question is to vest the title to the residuary estate in Messrs. Bulkley and myself, but, as I have said, neither Mr. Bulkley nor I would wish to derive any personal benefit under this codicil.

Yours truly,

THOMAS G. RITCH."

Upon reading this letter Mr. Vaughan asked what these private memoranda were, and thereupon Mr. Ritch had copies of the three memoranda prepared, and handed them to Mr. Vaughan, who took them away with the letter. On the same day Mr. Ritch wrote a letter to
49 Miss Joyce, in which, among other things, he said he would like to have Miss Joyce say to Mr. Fayerweather that he, Mr. Ritch, would execute any paper or say anything in her presence, or in that of any one else, that would enable him to feel that his wishes would be carried out to the letter, and that the will and codicils provide carefully for the institutions in which he was interested and for the relatives and friends to whom he was attached. This letter was read by Miss Joyce to Mr. Fayerweather on the evening of that day, and was on the next morning handed to Mr. Vaughan, who then read it.

On the 15th of November Mr. Vaughan again saw Mr. Fayerweather, and conversed about making another codicil to Mr. Fayerweather's will. At this time Mr.
50 Vaughan had present Mr. Ritch's letter of November 14 and the three said private memoranda. Certain immaterial changes were made on the memoranda of March 22, 1889, and certain other memoranda were made on the envelope containing the letter of Mr. Ritch to Miss Joyce, as follows: "Clause about Miss Joyce, about the men with him. More institutions for benefit. Mrs. Beardsley, amount $100,000 in bonds. Strike out about servants in his employ."

As a result of the conversation between Mr. Fayerweather and Mr. Vaughan, Mr. Vaughan had an interview with Mr. Ritch at his office, and gave instructions to have another codicil to Mr. Fayerweather's will pre-

pared. This was done, and Mr. Vaughan and two gentlemen connected with Mr. Ritch's firm returned to Mr. Fayerweather's house, and the following codicil was then and there executed:

"I, Daniel B. Fayerweather, of the City of New York, having made and executed my last will and testament, dated October 6, 1884, and codicils thereto dated December 13, 1884, January 7, 1888, and March 19, 1889, do hereby make, publish and declare this fourth codicil to and as a part of my said last will.

First.—In all respects, except as hereinafter modi-
51 fied, I ratify and confirm my said will and the codicils thereto.

Second.—I hereby confirm the revocation of the tenth paragraph of my said will.

Third.—I hereby amend and change the third paragraph of the codicil dated and made December 13, 1884, so as to read as follows: All the rest and residue of my estate, of whatsoever character and wheresoever situated the same may be, of which I shall died possessed, and remaining after all the specific legacies in my said will and the several codicils thereto have been paid and all the provisions of said will and codicils have been fully
52 complied with and carried into effect, I give, devise and bequeath to Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, to them and their heirs forever."

Mr. Fayerweather died on the same day, leaving his widow and three nieces him surviving.

On the 5th of December, 1890, proceedings to probate the will of Mr. Fayerweather were commenced. Waivers of citation and consent to the probate of the will and codicils were executed by the widow and the next of kin. The waiver and consent were subsequently withdrawn, and on the 15th of December, 1890, objections to the probate of the will and codicils were filed by the widow, and on the 21st of December, 1891, objections to

the probate of the fourth codicil were filed by the next of kin. The objections were to the effect that the will and codicils were not executed as required by law; that the testator was not of sound and disposing mind and memory, and that the will and codicils were procured by undue influence and fraud. The will was admitted to probate on the 25th of February, 1891.

On the 5th of March, 1891, a settlement was agreed upon between the executors, the widow and the next of kin, by which all objections to the probate of the will and four codicils were withdrawn, and by which they consented to the probate of the same. Said widow and
53 next of kin also agreed not to bring any suit for the construction of the said will and codicils or to set aside the will and codicils, or either of them, and not to make any claim upon the said Bulkley, Ritch and Vaughan, or either of them, or against their heirs or personal representatives, or against the said Bulkley, Ritch and Vaughan as executors or as residuary legatees, other than for the amounts left to the said widow and next of kin by the will and codicil aforesaid and by a certain instrument dated the 5th day of May, 1891. And they further agreed that upon the payment to them respectively of the several amounts mentioned in said last-mentioned instrument, they would severally execute a general release of all claims except those arising under the will and
54 codicil, both to the executors and to the donees mentioned in the said instrument of March 5, 1891, and to the said Bulkley, Ritch and Vaughan individually.

At the same time all of the plaintiffs, except the University of Rochester, and all of the other colleges and institutions mentioned in the ninth paragraph of Mr. Fayerweather's will executed a paper, wherein it was recited that a contest had been proceeding in the Court of the Surrogate of the County of New York against the probate of the last will and testament and four codicils thereto propounded by the executors of Daniel B. Fayerweather, deceased, and certain other proceedings had been threatened concerning the construction and validity of the will;

that the undersigned are legatees named in said will, and it is to their interest to have the said controversy settled and the threatened controversy abandoned; that a settlement of all the controversies had been previously agreed to, whereby the widow and next of kin have agreed to accept the sum of $310,000, and in consideration thereof to consent to the probate of the will and codicils as propounded, and to release the estate of said Fayerweather from all claims except those to which the said widow and next of kin are respectively entitled by the provisions of the will and codicils aforesaid; "and that in consideration of the foregoing, and to enable the provisions of
55 the said settlement to be carried out, it is agreed by the undersigned that the said sum of $310,000, and all expenses connected with the said litigation, be paid by the executors of the last will and testament of Daniel B. Fayerweather, deceased, prior to and in preference to the payment to the undersigned and respectively of the amount of the legacies in the will mentioned; and that each for ourselves agree that our respective legacies shall be postponed to the payment of the amount above mentioned and all the expenses above mentioned."

The codicils were admitted to probate by the consent of the widow and next of kin, and a final decree was entered on March 24, 1891. Thereafter the widow and next of kin executed and delivered the releases they had
56 agreed to deliver, as hereinbefore stated.

On the 24th of February, 1891, the said Ritch, Bulkley and Vaughan executed an instrument known as the deed of gift, by which they make specific gifts of various sums of money to individuals, to ten hospitals and to twenty-one colleges, among which are seven of the institutions named by Mr. Fayerweather, and by which any surplus of the residuary estate is directed to be divided into ten equal parts, and to be divided in certain proportions among certain of the defendants. The various persons, institutions and colleges named in this instrument have been made parties to this action.

This action is brought by the plaintiffs for the purpose

of having it decreed that all of the residuary estate left by the said Daniel B. Fayerweather, and devised and bequeathed to the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, was received and is held by them in trust for the plaintiffs and the several other institutions named in the ninth paragraph of the will of said Fayerweather, for the purpose of carrying out the intentions of the said Fayerweather as expressed in the tenth paragraph of said will, except as modified by the private memoranda hereinbefore set forth.

Mrs. Fayerweather is dead; but her personal representatives are parties defendant to this action, as are also
57 the next of kin of Mr. Fayerweather. They ask that the release executed by them be set aside, and that the residuary estate above referred to be given to them. The donees in the deed of gift are also parties to the action, and ask that the provisions of the deed of trust be carried out.

I shall first determine whether the claim of the plaintiffs can be maintained.

The earliest reported case bearing upon the subject in question is Rookwood's case (Crook's Elizabeth 164). Rookwood had three sons. He intended to charge his lands with four pounds per annum to each of his two youngest sons for their lives; but the eldest son desired him not to charge the land, and promised to pay to
58 the two youngest sons the four pounds per annum, to which the two youngest sons, being present, agreed. The older son did not pay after the death of the father, and the younger sons brought an assumpsit. The whole Court held clearly that it was well brought, and that it was a good consideration, for otherwise the land had been charged with the rent.

In Dutton *vs.* Pools (1 Ventris R., 318) the plaintiff declared that his wife's father, being seized of certain lands now descended to the defendant, and being about to cut one thousand pounds' worth of timber off from the lands to raise a portion for his daughter, the defendant promised to the father, in consideration that he would

forbear to sell the timber, that he would pay the daughter one thousand pounds. Judgment of nonsuit was reversed by the full bench.

In Chamberlaine *vs.* Chamberlaine (Freeman's Ch., 34) a testator having settled lands upon his son for life, and having discoursed about altering his will for fear there should not be enough beside to pay certain legacies to his daughters, was told by the son that he would pay them if the assets were deficient; but afterwards, pretending that the lands devised to him fell short of the legacies, filed his bill to have a sum alleged to be equal to the
59 deficiency raised out of other parts of the estate; and it was decreed that after suffering his father to die in peace on a promise which had prevented him from altering his will, he should pay them himself, and the Lord Chancellor said it was the constant course of his Court to make such decrees upon promises made that the testator would not alter his will. This was in 1679.

Thynn *vs.* Thynn (1 Vernon, 296) was as follows: A man made his will, and his wife executrix. The son afterwards prevailed on his mother to get the father to make a new will and to name him executor, but promising to be a trustee only for his mother. A trust was decred for the mother, notwithstanding the Statute of Fraud
60 and Perjuries. And to the same effect is Devenish *vs.* Baines (Prec. in Ch., 3).

In Olham *vs.* Litchford, Freeman's Chancery, 284 (1705). The case was that the testator was making his will and amongst other things was directing a gift to the plaintiff to be inserted in this will; and the defendant being present desired him not to put it in his will, but said as he was a Christian he would take care to see it paid; and thereupon it was omitted in the will. But the Lord Keeper decreed that the defendant should pay it, and the ground he went upon was that this was a fraud upon the testator and the (proposed) legatee.

A case is reported in 2 Equity Cases, Abridged, 46, as follows: The father purchased land for him and his heirs, and when he was on his death-bed sends for his eldest son and tells him that these lands were bought with the second son's money, and that he intended to give them to him. Whereupon the eldest son promised that he should enjoy them accordingly. The father dies. Lord Keeper Wright and the Master of the Rolls held that the oldest son ought to have these lands, because of the Statute of Frauds, there ought to have been a declaration of the use or trust in writing. But Cowper, Chancellor, was of another opinion, because of the fraud in this case, in
61 that the eldest son promised the father upon his death-bed that the other should enjoy the lands. So he took this to be a case out of the statute.

In Drakeford *vs.* Wilks (3 Atkins, 539) it was held that if a legatee promises a testator that in consideration of a disposition in her favor she will do an act in favor of a third person, she who undertakes to do the act must perform.

The facts in Reech *vs.* Kennegal (1 Ves., Sr., 123) are as follows: J. Kennegal, having made his will, deposited it in the hands of one of his nephews, whom he made executor and residuary legatee, with the manifest intention of reconsidering it, which he afterwards does in
62 the presence of the minister of the parish. William, another nephew, being then there, mentions the testator's intention to leave him one hundred pounds, which the testator allows, and desires his executor to pay, who undertakes it, but saying that there would be no occasion to alter the will for that purpose, for that he would pay it and give his bond or note if insisted upon. But the testator is satisfied with that, and dies the next day. It is argued that there was no element of fraud, nothing but a promise that chancery would not enforce. Hardwicke, Chancellor, said: "The question, then, is whether this is a case of fraud strengthened by the promise of the de-

fendant, and I am of opinion that it is. It has been taken as if the fraud must be on the person who might have a remedy at law, but this Court considers it as a fraud also upon the testator, for whom none can have remedy but a person coming here for payment. There is a breach of promise, but attended also with fraud upon the testator as well as the plaintiff by representing as if there was no occasion to alter the will, and comes within the proper jurisdiction of this Court as imposition."

In Barrow *vs.* Greenough (3 Ves., 152) the testator requested the executor and residuary legatee to make
63 certain payments in excess of the amounts named in the will. The residuary legatee promised to do as desired, but requested the testator to make a new will. He refused to do so, saying that he would leave the same to the defendant's generosity. The Court said: "The question is whether by reposing that trust in the defendant the testator was not prevented from making a new will. The defendant had no intention of fraud, but he ought to have told the testator that if he did not put it in his will he would not do it. Instead of that he promised to do it, upon which the testator refuses to make a new will, and says he leaves it to his generosity; that is, he leaves it to his conscience. I shall make him perform."

64

In Crooks *vs.* Brooking (2 Vern., 50, 106) Mallock bequeathed fifteen hundred pounds to Simon and Joseph Snow to be disposed of on such secret trust as he had privately revealed to Simon. After Mallock's death Simon, in a letter to Joseph, stated what the secret trust was. It was held that the trust was well and sufficiently declared by the letter and that both trustees were bound.

In Mestær *vs.* Gillespie (11 Ves., 638) Lord Chancellor Eldon held that a devisee who prevents his testator from changing a legacy by undertaking to pay it is bound in equity though not in law to pay the legacy, and that if a

tenant in tail is prevented from completing a recovery by the fraud of a person whose wife is entitled in remainder, equity will treat the estate even as against the wife who was innocent of fraud, as if the recovery had been suffered.

In Chamberlain *ex.* Agar (2 Ves. and Bea., 259) relief was granted upon the ground of fraud in not performing a promise relying on which the testator forbore to bequeath.

In Smith *ex.* Attersoll (1 Russ., 266) the Master of
65 the Rolls (Lord Gifford) held that where a testator bequeaths a legacy to A and B in trust for certain purposes which the will says have been fully explained to them, and on the same day A and B sign a paper writing to the effect that the bequest is upon trust for six persons whose names are stated, and after their signatures some lines are added in the handwriting of the testator by which a seventh person (an unborn child) is admitted to share in legacy, the paper writing was a valid declaration of trust.

In Pudmore *ex.* Dunning (5 Simons, 485) it was alleged that Sir T. Staines, desiring to provide for two natural daughters, made a will leaving his residuary estate
66 to his wife, "having a perfect confidence she would act up to those views which I have communicated to her in the ultimate disposal of my property after her decease." Previous to the execution of the will the testator remarked to his wife, "My wish is that the Pudmores" (meaning the plaintiffs) "shall have my property after your death, provided upon inquiry you find that they are respectable." To which she answered, "You may depend on me." The wife made a will, in which she provided for the natural daughters of her husband, and afterwards remarried. Upon her death her second husband took out letters of administration upon her estate, it appearing that the will had been destroyed by him. When the case was brought to trial the plaintiffs

failed (see 7 Simon, 644). The Court said that if the plaintiffs had proved their case they would have been entitled to the relief which they asked; but that they had so completely failed in proving it that their bill must be dismissed.

In Tee *vs.* Ferris (2 Kay and J. 357) the testator devised real and personal property to F. and the plaintiff as tenants in common, and by a memorandum of even date addressed to them, and signed by him, expressed his confidence that they would appropriate the property to charitable objects. This memorandum was read
67 to F. on the day of testator's death, after which he executed another codicil. Held, that F. by silently listening to the reading of this memorandum became chargeable with the trust. It was also held that the trust failed as to so much only as was invalid under the Mortmain Act, and that the devisees being tenants in common, those who were not informed of the intention of the testator before his death took their distributive shares free from the trust.

In Attorney-General *vs.* Dillon (13 Irish Ch., N. S., 127) it was held, where the testator left all his estate to a legatee absolutely, and the legatee promised to apply it to charitable uses, that it was a valid trust.
68

In Norris *vs.* Fraser (L. R., 15 Eq., 318, 1873) the testator gave her residuary estate to trustees for the benefit of a married woman. The plaintiff filed a bill alleging that the married woman and her husband both promised the testator at his request on his death-bed to make plaintiff an allowance of three hundred pounds a year. The wife testified that she assented, and the husband testified that he would not swear that he did not assent. Held, that a trust in plaintiff's favor was established.

In re Fleetwood Sidgreaves *vs.* Brewer (L. R., 15 Ch. Div., 594) the codicil gave all the testatrix's estate to a legatee "to be applied as I have requested him to do."

The testatrix, at the same time she executed the codicil, stated to the legatee the persons to whom and amounts for which she wished him to distribute the estate. This was held to create a valid trust in favor of the beneficiaries named.

In Boyes *vs.* Carriett (26 Ch. Div., 531, 1884) it was held that the testator must impose a trust, and the legatee must accept, in order that the trust may be enforced: but the acceptance may be implied from the legatee's silence.

69 It was held *In re* King's Estate (21 L. R., Ireland, 273, 1888) that if a testator at or before the execution of his will communicate to a person to whom he proposes to give a legacy that the legacy is given upon trust, to be applied in a particular way, and if the legatee expressly or tacitly consents to take the legacy on these terms, the Court of Chancery will not permit him to be guilty of a fraud, but will compel the execution of the trust so communicated, and that if the bequest be to two or more legatees, a valid trust is created if the communication be made to any one of them before or at the time of the execution of the will.

In Bedilian *vs.* Seaton (3 Wallace, Jr., 279) one Sea-
70 ton was about making a will leaving his property to his natural daughter, when one of his brothers said that he should make his mind easy and give himself no trouble about that; that the daughter should have it all, every cent of it. No will was executed. The brothers refused to give the daughter the property. Judge Greer said, if the property had been devised to John and James, the brothers, under a parol agreement by them that they would hold it in trust for Harriet, the daughter, the case would be like that of Hoge *vs.* Hoge (1 Watts, 163) and numerous others, in which equity treats the fraudulent procurer of the legal title as a trustee *ex maleficio*.

It was said in Hoge *vs.* Hoge (*supra*) that every part of

a will must be in writing, and a naked parol declaration of trust in respect of lands devised is void. "The trust insisted on here, however, owes its validity not to the will or declaration of the testator, but to the fraud of the devisee. It belongs to a class in which the trust arises *ex maleficio*, and in which equity turns a fraudulent procurer of the legal title into a a trustee to get at him, and there is nothing in reason or authority to forbid the raising of such a trust from the surreptitious procurement of a devise.

In Gaullaher *vs.* Gaullaher, following Hoge *vs.* Hoge
71 (*supra*), it was held that a moral obligation is sufficient to sustain such a promise.

In Jones *vs.* McKee (3 Pa. St., 496), Church *vs.* Ruland (64 Pa. St., 432), and Headley *vs.* Renner (129 Pa. St., 542), it was held in substance that if one promise a testator that he will give a legacy to a third person, such promise creates a valid trust which will be enforced.

In Schultz's Appeal (80 Pa. St., 396) a testator wished to leave his estate to charitable uses. The Pennsylvania statute provides: "That no estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic or to any person in trust for religious or charitable uses, except the same be done by deed or will attested
72 by two credible and at the time disinterested witnesses at least one calendar month before the death of the testator or alienor, and all dispositions of property contrary hereto shall be void and go to the residuary legatee or devisee, next of kin or heirs, according to law." The testator was advised that bequests of charity would be void if he should die within thirty days, but that he might make an absolute bequest of his property to a person in whom he trusted, and he might be informed of his wishes. The testator made a bequest to one Yeakle. The bequest was held good as against the next of kin. The devisee was not a party to the making of the will, and was not informed of the devise in his favor

until after the death of the testator. The Court said (Sharswood, *J.*): "It is urged that this whole plan is nothing but a contrivance to evade the statute. No, doubt, such was the intention of the testator. It is said that it is a fraud upon the law, and that the bequest ought, therefore, be declared void. But that overlooks the fact that the absolute property in the subject of this bequest has vested in the legatee, and that he is entirely innocent of any complicity in the fraud of the testator. If the statute is practically repealed by this construction, it is evident that it must be for the Legislature to devise and apply a remedy, not the judiciary, whose prov-
73 ince is not *jus dare*, but *jus di cere*."

In re Hoffner's Estate (161 Pa. St., 331), A owning property said to B he would will it to B, provided the latter would promise upon his death to will it to a certain church, designating the church. B promised to do it. A thereupon willed the property to B under that promise. B intended to carry it out and tried to do so; he made a will willing it to the church, but he died in less than a month after the will was made; so that the will was void. The Court said that the intention of these parties was to give the property to the church; we will follow out their intention; and, although we have to say the will is void, a constructive trust has arisen in favor of the church,
74 and we will compel the heir of this testator to convey according to that trust.

In Williams *vs.* Vreeland (32 N. J. Eq., 135, affd. *Ib.*, 734) it was held that the ground upon which such a trust is set up is simply that of fraud practiced by the party on whom the trust is said to be fastened, and nothing short of this can ever be held sufficient. For the prevention of fraud the trust is engrafted on the gift by admitting parol testimony in order to prevent the donee from appropriating property to a purpose different from that for which he undertook to hold it. It was held in this case, in order to maintain it, two facts must concur—

first, that the testator gave a legacy to the legatee in order that he might take it not wholly for his own benefit, but also as trustee for complainants; secondly, that the testator's mind and intention were made known before his death to the legatee, and the legacy was accepted by him on this footing. And to the same effect is Carber *vs.* Todd (48 N. J. Eq., 102).

In Oliffe *vs.* Wells (130 Mass., 221), Gray, Chief Justice, said: "Where a trust not declared in the will is established by a Court of Chancery against the devisee, it is by reason of the obligation resting upon the con-
75 science of the devisee and not as a valid testamentary disposition by the deceased. When the bequest is outright upon its face the setting up of a trust, while it diminishes the rights of the devisee, does not impair any right of the heirs or next of kin in any aspect of the case; for if the trust were not set up the whole property would go to the devisee by force of the devise. If the trust set up is a lawfnl one, it inures to the benefit of the *cestui que trust*, and if the trust set up is unlawful the heirs or next of kin take by way of resulting trust.

In Gilpatrick *vs.* Gliddon (81 Me., 137) it was held that when one obtains the legal title to real or personal estate, either by will or otherwise, under circumstances which render it unconscientious for him to retain it for his
76 own benefit, while in fact another is entitled to it or to some interest in it, equity secures to the latter his right, not by disregarding the former's legal title, but by imposing on him the duty of holding and using his title for the real beneficiary." * * * "Equity does not interfere with the will; that remains unchallenged." * * * "We do not mean, however, that it is essential to the upholding of such a trust that a devisee should have been an active agent in procuring the devise to be made in his favor, for the great current of English authority during the last two centuries, as well as that of this country, holds that if either before or after making the will the testator makes known to the devisee his desire

that the property shall be disposed of in a certain legal manner other than that mentioned in the will, and that he relies upon the devisee to carry it into effect, and the latter by any words or acts calculated to and which he knows do in fact cause the testator to believe that the devisee fully assents thereto, and in consequence thereof the devise is made, but after the decease of the testator the devisee refuses to perform his agreement, equity will decree a trust and convert the devisee into a trustee, whether when he gave his assent he intended to defraud or not, the final refusal having the effect of consummating the fraud."

77

In Dowd *vs.* Tucker (41 Conn., 197) the testatrix upon her death-bed desired to change her will and give certain real estate to a niece and had a codicil prepared for that purpose. By the will all the property was given to one Tucker and before signing the codicil she wished to secure his consent to the change. After stating her purpose to him he replied that she was weak and need not trouble herself to sign a codicil, but that he would deed the property to the niece and carry out her wishes. Trusting in his promise she did not change her will. After her death Tucker refused to convey to the niece. On a bill in equity brought to compel him to convey it was held that he took the property under a trust for her,

78 which a court of equity would enforce.

To the same general effect is Buckingham *vs.* Clark (61 Conn., 204).

In Gaither *vs.* Gaither (3 Md. Ch., 158) it was held that if an heir or personal representative or devisee, whose interest would be prejudiced by the insertion of a provision in a will in favor of some third person, induces the testator to omit such provision by assurances either by words or silent assent that his wishes shall be executed as if the provision were made, such assurance will raise a trust which will be enforced in equity on the ground of fraud.

In Ragsdale *vs.* Ragsdale (68 Miss., 92), it was held that where one has prepared a will naming his son as devisee of certain land, and afterwards in his last illness, when proposing to give by codicil a half interest therein to another son, the devisee named actively interferes, and by assurances that he will convey to his brother the half interest, together with other conduct and representations, prevents the making of the codicil, he will after the testator's death, be held a trustee of a half interest in the land for his brother; and that while an oral promise to hold land in trust for another person is void, thus to interfere and prevent a testator from making a provi-
79 sion for another, whereby a bounty intended for such other is intercepted, is a fraud from which a trust arises by operation of law, not within the Statute of Frauds or Wills.

In Larmont *vs.* Knight (29 N. E. Rep., 1116; 30 *Ib.*, 318), where a married woman on her death-bed, on her husband's promise that he would redeem certain property in which she had an equity of redemption, and hold the property for the benefit of her children, conveyed the interest in the property to her husband, it was held that he became a trustee for the children, and that it was not necessary to show that he expressed any purpose not to perform his promise. The fact that he did not com-
80 ply with his promise was presumptive evidence that he did not intend to do so when it was given.

In Barrell *vs.* Hanrick (42 Ala., 60), the testator bequeathed to Edward Hanrick his whole estate, and afterwards made a codicil making two specific legacies. Plaintiff, a resident of New Jersey, a brother of testator, brought suit against Hanrick's legal representatives alleging that the will was executed during the war of the Confederacy; that under the laws of the Confederate States a citizen of New Jersey was regarded as an alien enemy; that the bequest was made to Hanrick for the use of plaintiff that it might not be sequestrated. The Court

held that this was a valid trust of real property not prohibited by statute.

In a case in Tennessee, McClellan *vs.* McLean (2 Head., 684), the testator made an absolute bequest of his property to his wife. It was shown that the will was made upon an agreement with the wife that the property should be divided upon her death equally between her relatives and his. She subsequently made a will leaving more of the property to her relatives than to his. It was held that the trust could be established by parol, and that being so established it would be enforced against the
81 beneficiary under the wife's will. And in Richardson *vs.* Adams (10 Yeager, 273) a similar promise in reference to personal property was enforced.

In Bennett *vs.* Harper (36 W. Va., 546) the testator devised a farm of six hundred acres to the complainant, one of his daughters, which farm he had previously given to the husband of another of his daughters by a voluntary deed, said husband having during the life of the testator being made aware of the contents of his will, and that in order for it to be effective to bestow any benefit upon the plaintiff it would be necessary for him to surrender the former voluntary donation, and that the will was made upon that condition. It was held that the said vol-
82 untary donee *inter vivos* having assented to such condition or having lain by and acquiesced without objection or remonstrance, thereby securing to himself and wife the whole property designed by the testator to be divided between his two daughters, this conduct was such as to render him a trustee for the complainant to the extent of the interest she would have taken under her father's will.

In Tolles *vs.* Burton (Richards' Eq. Cas., 146; 24 Am. Dec., 409) it was held that a trust may be established by parol in an absolute bequest by showing that the legatee received it upon a promise made to the testator to provide for a third person out of it.

In Hooker *vs.* Axford (33 Mich., 453) plaintiff's wife was the owner of property which she wished to leave to her husband free from the claims of his creditors. She sent her husband to consult one of the defendants, an attorney, who advised that the wife devise the property to him and Axford on an oral understanding that he would hold it for plaintiff's benefit. The wife did so. Axford knew nothing of the arrangement. The plaintiff brought a bill to enforce the trust so arising. The attorney admitted the allegation and expressed his willingness to convey. Axford claimed the legal title. It was held that
the promise of the attorney raised a trust which
83 would be enforced against Axford as well as against
the person who made the promise. Cooley, Chief Justice, said: "The will then must be regarded as made as it was, because Crocker, who was an attorney at law, advised that it should be. If he had given the advice intending to appropriate the property, this would have been a gross fraud and a gross breach of confidence. It would be equally a fraud if, having given the advice honestly, he should afterwards conclude dishonestly to retain the lands, and this being his position the party who under his advice is associated with him is in the like position. It would be a fraud in Axford to appropriate that which only by the advice of Crocker given for another
person's benefit is brought within his reach. The
84 fraud on Mrs. Hooker's estate would be exactly the
same whether one or the other of the nominal beneficiaries repudiates the trust.

In Spicer *vs.* Spicer (16 Abb. Pr., N. S., 112) the plaintiff sued the defendant to recover a sum claimed to be due under the following circumstances: Plaintiff married one John, a brother of defendant. She had a previous husband then living. John proposed to make a will in favor of the plaintiff. The defendant said he could propose a better plan, and that if John would convey his interest in the property to him, he would pay plaintiff a sum equal to her dower. John dying, the defendant refused to

complete his agreement. The Court held that he must.

In Williams *vs.* Fitch (18 N. Y., 546) the father of the testatrix had in his hands a sum of money which he held as trustee for testatrix, which he agreed to hold as trustee for the nephew of the testatrix in consideration that she would not make a will leaving the property to her nephew. It was held that after the death of the testatrix the father held the funds in trust for the nephew.

85 In Moyer *vs.* Moyer (21 Hun, 67) a father conveyed land to his son upon his agreement to hold the land for the benefit of the grantor's widow and infant children. It was held that the grantee held as trustee.

The most important case on this point, however, is O'Hara *vs.* Dudley (95 N. Y., 403). The testatrix in that case gave a bulk of her estate to three persons, who were her lawyer, her doctor and her priest. It was not intended by her to give to the persons named any beneficial interest, but her design was to devote the property to certain charitable purposes. This, she was advised by one of the legatees, could not be done by express provision in her will, but only by an absolute gift to indi-
86 viduals, to whose honor she could confide the execution of her purpose. She signed a letter of instructions cotemporaneous with the will addressed to the legatees and devisees, stating the reason for the gift and dictating the purpose to which it should be put. The will was executed in reliance upon a promise of the legatees to apply the fund faithfully and honorably to the uses specified by the testatrix. In an action to establish a trust it was held that the gift could not be sustained as an absolute one to the persons named as legatees, as this would be a fraud upon the testatrix; that the secret trust attempted to be created could not be enforced, nor would equity permit it to be carried out, as it was in violation of the statute against perpetuities; but equity would impose a trust upon the fund for the benefit of the heirs and

next of kin. Judge Finch stated in writing the opinion of the Court in this case. "Equity acts in such case not because of a trust declared by the testator, but because of the fraud of the legatee. For him not to carry out the promise by which alone he procured the devise and bequest is to perpetrate a fraud upon the devisor which equity will not endure."

The doctrine of this case in this respect was affirmed in the Matter of Kileman (126 N. Y., 73).

87 There is a class of cases in which the Courts have refused to enforce a trust created *dehors* the will, where the trust was created for the purpose of evading statutes like the Mortmain statutes.

The first statute relating to Mortmain is contained in the second great charter of King Henry III., Chapter 43. The charter provided that "it shall not from henceforth be lawful for any to give his lands to any religious house and to take the same land again to hold of the same house; nor shall it be lawful to any house of religion to take lands of any and to lease the same to him from whom they were received. Therefore, if any from henceforth do give his land to any religious house and thereupon be convict, his gift shall be utterly void, and the land shall

88 accrue to the lord of the fee." This provision was continued in the third great charter of King Henry III., C. 36; and also in the first great charter of King Edward I., granted October 12, 1297, in the twenty-fifth year of his reign; in the Statute *de Religiosis*, 7 Edward I., St. 2; the Statute of Westminster 2, 13 Edward I., St. 1, Ch. 22; the Statute *Quia Emptoris*, 18 Edward 1, C. 3; and the Statute of Amortizing Lands, 34 Edward I., St. 3; 18 Edward III., St. 3; 15 Richard II., C. 5; 23 Henry VIII., C. 10, St. 2, 3, 4, 5; 7 and 8 William III., Sec. 37, 1, 2; and 9 George II., C. 36; commonly known as the Mortmain Act (see, also, 2 Bl. Com., 268).

Magna Charta and the statutes above referred to were little more than a restoration of the common law as it existed in the time of the Saxons, about sixty years before

the reign of William I., at which period it was essential to procure a license from the king and the intermediate lord before estates could be alienated to any community by which rents and services should be entirely lost; and if no such license were obtained, the king or other lord might enter upon the land so alienated in Mortmain as a forfeiture (Thompson's Historical Essay on the Magna Charta, p. 260).

The last statute (9 Geo. II., C. 36) provides that no lands or tenements or money to be laid out thereon shall be given for or charged with any charitable uses whatsoever, unless a deed indented, executed in the presence
89 of two witnesses, twelve calendar months before the death of the donor, and enrolled in the Court of Chancery within six months after its execution (except stocks in the public funds, which may be transferred within six months previous to the donor's death), and unless such gift be made to take effect immediately and be without power of revocation, and that all other gifts shall be void.

This statute was before the Court in Boson *vs.* Statham (1 Eden, 508) upon the following state of facts. There was a devise by will attested by three witnesses to A. B and C, and the heirs of the survivor. The bill stated that it was upon a secret trust for a charity, declared by an instrument executed at the same time as the will, and
90 attested by two witnesses only, which was admitted by the answer. And it was held by Lord Keeper Henley that the devise was void under the Statute of Mortmain.

And in Edwards *vs.* Pike (1 Eden, 267) the same Lord Keeper held a devise to be void, it being proved to be upon a secret trust for a charity.

The doctrine of those cases was followed by Lord Chancellor Eldon in Stickland *vs.* Aldridge (9 Ves., 516). In that case there was an attempt to avoid the Statute of Mortmain (9 Ceorge II., Chap 36). Lord Eldon said it would be a strong proposition that the providence of the Legislature having attempted expressly to prevent a dis-

position of land for purposes of this sort was so short as to be baffled by such a transaction as is stated by this bill. The statute was never permitted to be a cover for fraud upon the private rights of individuals, and though within the intention it cannot be said a trust is declared under these circumstances it is clear a trust would be created upon the principle on which this Court acts as to fraud In the ordinary case of an estate suffered to descend, the owner being informed by the heir that if the estate is permitted to descend he will make a provision for the mother, wife or other person, there is no doubt this Court would compel the heir to discover whether
91 he did make such promise."

* * * "It would be singular if the Court would protect individuals, and would not act to prevent a fraud upon itself."

It was held in Gore *vs.* Clarke, in the Supreme Court of South Carolina (reported, Vol. 20, p. 465, Law R., Ann) that a devise intended to evade the provisions of a statute limiting the amount of property that can be given to a woman with whom testator had lived in adultery or to his illegitimate children, although it is on the face of the will an absolute gift to a stranger, will not be upheld merely because the devisee had no notice during the testator's lifetime of the secret trust intended. A stat-
92 ute of South Carolina declares null and void any gift, devise or any other devise whereby a person intends that more than one-quarter of this estate shall go to his illegitimate children.

It will be noticed that in cases like Gore *vs.* Clarke, Boson *vs.* Stathan and Tee *vs.* Ferris (*supra*), the thing that the testater attempted to accomplish by creating the secret trust was something prohibited by law: while that which Mr. Fayerweather sought to accomplish, namely, a gift of money to literary institutions is not prohibited by law. And there is no public policy outside of the statutes (of 1848 and 1860), which condemns testamentary gifts to such institutions.

He could have given his estate or any portion thereof to the institutions named in the ninth paragraph of his will during his lifetime, and the gift would have been valid. He could have given it to them on his death-bed, as he gave the $100,000 in bonds to Mrs. Beardsley, and the gift would have been valid. The only thing that the law prohibited him from doing was, willing more than one-half of his estate to such institutions. But if the testator had the right to give more than one-half his estate to such institutions during his lifetime, he had a
93 right to give it to a devisee upon the promise of the devisee that after the testator's death he, the devisee, would divide the estate in the manner the testator wished. For the Courts have held that but for the promise the testator himself might have done what the devisee promised to do (Chamberlaine *vs.* Chamberlaine, Reech *vs.* Kennegal, Barrow *vs.* Greenough, *supra*). "In these cases," said Kay, *J.*, *in re* Boyes, Boyes *vs.* Carriett, 26 Ch. Div., 531, "the Court has compelled discovery and performance of the promise, treating it as a trust binding the conscience of the donee, on the ground that otherwise fraud would be committed, because it is to be presumed that if it had not been for such promise the testator would have made * * * the gift."
94 (See also Williams *vs.* Fitch, Dowd *vs.* Tucker, Brooks *vs.* Chappell, *supra*).

That this trust is not a testamentary trust, that is, is not a trust created by will, was decided in Oliffe *vs.* Wells (*supra*). It seems clear to me that if this trust was not created by will it does not come within the prohibition of the statutes of 1860, and that it is a valid trust, and should be carried out by the residuary legatees.

It is, however, contended by the defendant Bulkley that he made no promise to the testator, and did not in fact know of the secret trust until after the death of the

testator, and that therefore as to him there was no trust. This contention cannot be maintained (O'Hara *vs.* Dudley, Hooker *vs.* Axford, *supra*). What was the trust on which the defendants Bulkley, Ritch and Vaughan held the residuary estate? It was to carry out the intentions expressed in the will of Mr. Fayerweather. The only expression of the intention of the testator in regard to the residuary estate is contained in the tenth paragraph of his will, and is to the effect that all his residuary estate shall be divided among the several corporations mentioned in the ninth paragraph of his will share and share alike.

That intention never was changed; on the other hand,
95 he reiterated it by the codicil of November 11, 1890.

That intention the said defendants are in duty bound to carry out.

I am of the opinion that the testator did not change his intentions in regard to the institutions mentioned in the ninth clause of his will by the memorandum of March 22, 1889. That memorandum mentioned three of the institutions, Hampton, Lincoln and Cornell Universities named, and one, The North Western, not named in the ninth clause. In it the testator says that in his judgment the bequests to Lincoln and Hampton Universities should be withheld and the bequest of $200.000 to Cornell University should be reduced to $100,000. It is well settled that a testator cannot change his will by a paper not
96 executed with all the formalities of the statute relating to wills. Adington *vs.* Cann, 3 Atkys, 141; Johnson *vs.* Ball, 5 De G. & S., 85; Lomax *vs.* Ripley, 3 Small & G. 48; Tee *vs.* Ferris, *supra;* Jumpes *vs.* Batchelor, 19, L. T., 200; *In re* King's Estate, 21, L. R. Ireland, 273; Thomas *vs.* Thomas, 7 West Rep., 66; Mann *vs.* Mann, 14 Johns., 1; Tole *vs.* Hardy, 6 Cow., 333; Booth *vs.* Baptist Church, 126 N. Y., 248, and cases there cited.

In Williams *vs.* Freeman, 83 N. Y., 561, there was memorandum made by the testator. Judge Rapallo, in writing the opinion of the Court, used this language: The memorandum forms no part of the will, and is not

attested in such manner as to form a testamentary declaration. It is merely a parol declaration of the testator, * * * and comes under the head of extrinsic evidence. * * * The declarations of a testator can never be resorted to for the purpose of contradicting, or even explaining, the instructions expressed in the will.

The memorandum of March 22, as far as it relates to the North Western University, in view of the pleadings and the action of the residuary legatees, acts as an extension of the trust upon which those legatees took the residuary estate. But in any event the North Western University is entitled to take, because the legatees men-
97 tioned in the ninth clause of the will, who are the only persons, in the view that I have taken of the law of this case, interested in its not taking, consent to its taking.

It is claimed by the defendants that the paper, Exhibit 10, executed by the institutions mentioned in the ninth paragraph of the will, operated as a ratification of the deed of gift. I cannot give such effect to that paper. The only agreement on the part of those institutions contained in that paper is that the sum of $310,000 and certain expenses should be paid prior to the payment of the legacies to them; and in the view I have taken of the law of the case, that payment was made from the fund that belonged to those institutions alone. None of the do-
98 nees in the deed of gift was injured by the execution of Exhibit 10.

Nor does the fact that the executors and trustees had a discretion under the ninth paragraph of the will change the aspect of affairs. That discretion was to be exercised only in case the conditions and circumstances of any of the said institutions should be so changed that it was not expedient to pay to such institution all or any portion of its legacy. That discretion was not an arbitrary one. It was to be exercised only if there were grounds for its exercise, and there being no such ground shown in the evidence, the executors and trustees had no right to refuse to pay any legacy to any one of said institutions.

Nor are the plaintiffs barred from maintaining this action by reason of the proceedings in the Surrogate's Court for the assessment of the inheritance tax (Matter of Ullmann, 137 N. Y., 403, 407).

The view that I have taken of the facts and the law of this case renders it unnecessary for me to consider the very interesting questions of law propounded by the learned counsel for the defendants Reynolds, Achter and Fayerweather.

I have said that the defendants Ritch, Bulkley and Vaughan were trustees *ex maleficio*. I do not mean to be understood as saying that either one of said defend-
99 ants committed any actual fraud against the testator. I have no doubt they did what they thought they had a right to do. There is nothing in the evidence showing that *all* of Mr. Ritch's acts in regard to the testator were not free from fraud. I do not give effect to the deed of gift because I am of the opinion on the evidence that Mr. Fayerweather did not change his intentions as expressed in his will and codicils and the private memoranda.

Judgment is ordered directing that the said residuary estate devised and bequeathed to the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan was received and is held by them in trust for the plaintiff herein and the several institutions named in the ninth
100 paragraph of the will; and for the North Western University in the sum of $100,000; that said residuary estate now in their possession, except that part thereof necessary to provide for the payments mentioned in the third paragraph of the plaintiff's prayer for relief, is now held by the said defendants in trust for the plaintiffs and the said several other institutions, upon the trust stated in the tenth paragraph of the will; that the said defendants be enjoined from distributing the residuary estate under the deed of gift; that they ac-

count for the moneys received by them under said last will and testament and codicils before Charles W. Dayton, who is hereby appointed Referee to take and state their accounts; and that they have the costs of this action.

CHARLES H. TRUAX,

J.

For decision of Justice Truax see Vol. I, page 63.

For Judgment thereon see Vol. I, page 66.

101

102

SUPREME COURT,

GENERAL TERM—FIRST DEPARTMENT.

DECEMBER, 1895.

Present—Hon. CHARLES H. VAN BRUNT, *P. J.*
DAVID L. FOLLETT and ALTON B. PARKER, *JJ.*

103

TRUSTEES OF AMHERST COLLEGE, Trustees of Dartmouth College, Trustees of Hamilton College, The University of Rochester, The President and Trustees of Williams College, Respondents,
against
THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN, individually and as Trustees and Executors of the Last Will and Testament and
104 Codicils thereto of Daniel B. Fayerweather, deceased; Barnard College, Union College and others.
Appellants and Respondents.

Exhibit 5.

Opinions of General Term.

FOLLETT, *J.*

The testator by his will and codicils disposed of his estate as follows:

By the first clause he revoked all former wills. By the second he directed the payment of his debts, funeral expenses and the expenses of settling the estate. By the third, fourth and fifth clauses he devised and bequeathed to Lucy Fayerweather, his wife, $10,000, his residence, No.

11 Fifty-seventh street, with all the household furniture and effects therein, together with the horses and carriages and personal effects in the stable connected with the house, and a net annual income of $15,000 during her life, payable quarterly, which provisions were in lieu of dower. By the seventh clause of the will and the fifth clause of the third codicil he bequeathed $100,000 to Lucy J. Beardsley, $20,000 to Mary W. Achter, and $20,000 to Emma S. Drury, three nieces, who were his only heirs and next of kin. By the sixth clause of the will and the third clause of the of the third codicil he bequeathed to Anner Amelia Joyce (now Reynolds) a
105 life annuity of $4,000, provided she remained unmarried. By the seventh clause of his will and by the second and third codicils thereto he bequeathed $32,600 to various employees and servants. By the eighth clause of his will he gave to five hospitals in the City of New York $95,000, as appears by this clause quoted in the statement of facts. By the ninth clause of his will he bequeathed $2,100,000 to twenty educational corporations. By the third clause of the fourth codicil and last codicil the remainder of his estate was disposed of as follows:

"All the rest and residue of my estate, of whatsoever character and wheresoever situated the same may be, of which I shall die possessed and remaining after all
106 the specific legacies in my said will and the several codicils thereto have been paid, and all the provisions of said will and codicils have been fully complied with and carried into effect, I give, devise and bequeath to Justus L. Bulkley, Thomas G. Ritch, and Henry B. Vaughan, to them and their heirs forever."

The testator's estate amounted at his death to upwards of $6,000,000, and after providing for all of the annuities and the specific devises and bequests, the residuary estate passing under the clause last quoted amounted to upwards of $3,000,000.

The Special Term found the following facts: That the defendants Thomas G. Ritch and Henry B. Vaughan, for

themselves and on the part of Justus L. Bulkley, promised Daniel B. Fayerweather, now deceased, and induced him to believe, that if he would make them and the defendant Justus L. Bulkley residuary legatees of his estate, as provided in the codicils to his will, dated December 13, 1884, and November 15, 1890, the said residuary legatees would sell and convert said residuary estate into cash and divide the same equally, share and share alike, among the twenty corporations mentioned in the ninth paragraph of the said Daniel B. Fayerweather's will, dated October 6, 1884, including the plaintiffs, after paying $100,000 to the Northwestern University,
106 and that the said Daniel B. Fayerweather made the said Ritch, Bulkley and Vaughan his residuary legatees in and by the said codicils in reliance upon the said promises and inducements, and died leaving the said Ritch, Bulkley and Vaughan his residuary legatees in the belief so induced by them that they would sell, convert and distribute the residuary estate as aforesaid, and that the said Ritch, Bulkley and Vaughan have attempted to dispose of the said residuary estate in violation and disregard of the said promises.

These facts are amply supported by the evidence. The testimony of Ritch and Vaughan and the correspondence conclusively show that they definitely promised the testator to dispose of the residuary estate bequeathed
107 to them in accordance with the provisions of the tenth clause of the will. No other conclusion is possible, and we are of the opinion that the evidence warrants the conclusion that there was an understanding between Justus L. Bulkley and the testator that the estate should be so disposed of. Bulkley had for many years been an intimate friend of the testator and was nominated as one of the executors in the will of 1880, and he joined with the other residuary legatees in divesting themselves of all personal interest under the residuary clause of the will, which seems to us to show that there was an understanding between the testator and all of the residuary legatees that the residuum should be disposed

of in accordance with the testator's wish expressed in his will and the memorandums.

This brings the case within the rule laid down in O'Hara *vs.* Dudley (95 N. Y., 403). The residuary legatees acquired no personal interest in the residuum, but took it as trustees.

The executors of the testator's widow and two of his heirs at law and next of kin seek to have the residuary clause declared invalid under Chapter 360 of the laws of 1860, which provides:

SECTION 1. No person, having a husband, wife,
108 child or parent, shall by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of one half, and no more."

The difficulty with their contention is that the widow and heirs released all of their interest in the estate for valuable considerations paid to them. This statute was designed for the protection of husbands, wives, next of kin and heirs at law, but it does not in any wise prevent
them from releasing to educational corporations the
109 benefits which they might have secured by resisting wills in contravention of the statute. It is urged that these releases were procured by fraud and undue influences. There is no evidence in the record justifying this contention. The terms of settlement were agreed on during the controversy in the Surrogate's Court over the probate of the will and codicils, and the widow and heirs were represented in that controversy, and in the settlement, by distinguished counsel and acted under their advice. The residuary legatees not having any personal interest in the residuary estate, and the widow and heirs having all their interest therein, there is no person who is entitled

to raise the question that the residuary clause is void under the Act of 1860.

No person or corporation, except the State in certain cases, can impeach the validity of the disposition of property by will, unless the contestant if successful will acquire some interest under the statutes of descent or of distribution, or as devisee or legatee, in the property attempted to be disposed of by the will; and if the person entitled to contest a will, or some one or more of its provisions, voluntarily and for a valuable consideration, received after the testator's death, with full knowledge of the invalidity of the will, divests himself of all interest in the property attempted to be disposed of by it, he cannot impeach its validity.

The judgment should be affirmed, with separate bills of costs in favor of the respondents, payable out of the estate.

PARKER, *J*, concurred.

VAN BRUNT, *P. J.*—The facts upon which the controversies in this case arise are not disputed, and as I understand them are briefly these:

On the 6th of October, 1884, Daniel B. Fayerweather made a will by which in the ninth clause thereof he bequeathed certain sums of money to twenty educational institutions, and then by the tenth clause he devised all the rest, residue and remainder of his estate to his executors in trust, to sell and convert into cash and to divide the same equally among the several corporations mentioned in said ninth paragraph, share and share alike.

Fayerweather was advised by his counsel that the provisions of his will contravened the restrictions of the law of this State relative to benevolent corporations. Upon the execution of the will he delivered it to one of the executors, with a certificate, stating that he had been so advised, and expressing the trust that his "heirs" would permit the provisions of his will to be carried into effect.

The statute which was contravened by the provisions of the will was that which prohibited a person having a husband, wife, child or parent from devising or bequeathing to any benevolent, charitable, &c., society, in trust or otherwise, more than half of his or her estate after the payment of his or her debts.

On the 13th of December, 1884, Fayerweather, having become suspicious as to the forbearance of his widow and next of kin in the assertion of the rights conferred upon them by the statute above mentioned, executed a codicil to his will, by which he revoked the tenth clause and bequeathed all the rest, residue and remain-
112 der of his estate to the persons named in the eleventh paragraph of his will as his executors. Upon the execution of said codicil the testator delivered it with a memorandum to Mr. Ritch, one of his executors, in which he stated that he had made these executors his residuary legatees in the confidence that thereby his intentions as expressed in his will would be carried into effect, and without litigations on the part of any person or persons interested.

On the 7th of January, 1888, the testator executed a second codicil, by which he gave certain additional legacies, named a third person as executor of his will and trustee of his estate, and conferred the same powers on the three executors as had been conferred by
113 the will on the two.

On the 19th of March, 1889, the testator executed a third codicil, by which he ratified his will and codicils, except as therein modified. He made some changes and gave some additional legacies. Upon the execution of this codicil he delivered it with a memorandum to one of his executors for safe keeping. The memorandum related to sums to be given to certain charitable institutions, and also some small gifts to divers persons.

On the 13th of November, 1890, this executor, upon the testator's order, delivered his will and the first, second and third codicils to the executor whom the testator had last named, who delivered them to the testator.

On the next day the testator sent a letter to one of his executors, calling his attention to the revocation of the tenth clause of the will by the first codicil, and the devise of all the rest, &c., of his estate to the executors named in the eleventh clause, and asked, "Please advise me at once, in writing, what is the legal effect of this clause, and to whom and how would my residuary estate go in case of my death, supposing the first codicil to remain in force."

To this letter the executor, Mr. Ritch, replied: "The intention of the change in question was to enable
Messrs. Bulkley and myself to carry out the inten-
114 tions of the will as modified by the various private
memoranda in my possession. Neither Mr. Bulkley nor myself would have any moral right to treat any portion of your estate otherwise than as we know would conform to your wishes, I suggest that I call on you with these, and if still approved by you, that they be left in a sealed package with Miss Joyce, or any one named by you. The legal effect of the clause in question is to vest the title to the residuary estate in Messrs. Bulkley and myself, but, as I have said, neither Mr. Bulkley nor I would wish to derive any personal benefit under the codicil."

On the 15th of November, 1890, the testator executed a fourth codicil, by which he ratified and confirmed his
will and codicils, and especially confirmed the revoca-
115 tion of the tenth clause and changed the third clause
of the first codicil so as to devise the residue, &c., of his estate to his three executors instead of two.

On the same day the testator died, leaving said will and four codicils unrevoked. This will and codicils have been admitted to probate.

By these instruments, it is clear that the executors and devisees took the rest, residue and remainder of the estate as trustees, the corporations named in the ninth clause of the will being the *cestuis que trust*, which trust can be enforced by the *cestuis que trust* unless the rights of some parties secured to them by law will be thereby contravened.

It is clear that these executors could not put this residuary estate into their own pockets and apply it to their own uses, the testator having made this disposition of his estate upon their promise to apply it in the manner provided for by his will.

The 10th clause of the will, although revoked by codicils, still existed for the purpose of defining the trust.

The testator left him surviving a widow, who was the only person who could call into operation for her protection the statute which we have quoted. The widow, however, has released to the executors all claims to the estate, which release cannot be successfully attacked
115 or set aside. There is consequently no person for whose benefit the statute can operate.

No rights of heirs and next of kin have been infringed upon, because the trust does not contravene any statute for their benefit, and is not the subject of attack by them. If it were, they have also executed a release of their interest in the estate in the same manner as the widow.

We have therefore the case of a trust established, which would be valid as against all the world but for the statute in favor of the widow; and the widow, having released all her rights in the estate, how can she claim the invalidity of a trust as to property in which she has no interest?

The widow is not aggrieved, and under such circum-
116 stances the trust must be executed.

At a General Term of the Supreme Court held at the Court House in the City of New York, on the 18th day of December, 1895.

Present:—Hon. CHARLES H. VAN BRUNT, *P. J.*
ALTON B. PARKER, } *JJ.*
DAVID L. FOLLETT, }

TRUSTEES OF AMHERST COLLEGE, TRUSTEES OF DARTMOUTH COLLEGE, Trustees of Hamilton College, the University of Rochester, the President and Trustees of Williams College.
Plaintiffs.
against
THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN, individually and as Trustees and Executors of the Last Will and Testament and Codicils thereto of Daniel B. Fayerweather, deceased; Barnard College, Union College and others,
Appellants.

Exhibit 6.

Order of Affirmance of General Term.

Appeals having been taken to the General Term of the Supreme Court from the judgment entered in this action in the office of the Clerk of the City and County of New York, on the 31st day of December, 1894, by the defendants John B. Reynolds and Morris B. Beardsley, as executors of the last will and testament of Lucy Fayerweather, deceased, and by the defendants Mary W.

Achter and Emma S. Fayerweather, as against the other parties hereto; and by the defendant the Trustees of Columbia College, in the City of New York: by the defendants the President and Fellows of Yale College and Rutgers College; by the defendant the University of the City of New York; by the defendants the Womans' Hospital in the State of New York and Brown University of Providence, R. I.; by the defendant The New York Eye and Ear Infirmary; by the defendant Barnard College; by the defendant the President and Fellows of Harvard University; by the defendant Vassar College; by the defendant the Trustees of Union College, in the Town
119 of Schenectady, in the State of New York; by the defendant the St. Vincent's Hospital, in the City of New York; by the defendant the Manhattan Eye and Ear Hospital; by the defendant the Manhattan Dispensary, in the City of New York; by the defendant the Trustees of the College of New Jersey, sued herein as Princeton College; by the defendant The Methodist Episcopal Hospital, in the City of Brooklyn; by the defendant St. Luke's Hospital; by the defendant Trinity College; by the defendant Mt. Sinai Hospital; by the defendants the New York Cancer Hospital and The Peter Cooper Union for the Advancement of Science and Art; by the defendant the Elmira Female College; by the defendant the Presbyterian Hospital; by the defendant
120 the Shattuck School; by the defendants the University of Pennsylvania and Haverford College; by the defendant the Montefiore Home for Chronic Invalids; by the defendant Wells College; by the defendant Thomas G. Ritch, individually and as executor of the last will and testament of Daniel B. Fayerweather. deceased; and by the defendants Justus L. Bulkley and Henry B. Vaughan, individually and as executors of the last will and testament of Daniel B. Fayerweather, deceased; as against the other parties hereto.

And the said appeals having come on to be heard, and having been argued by Stewart L. Woodford and William C. Wallace, of counsel for the appellants Thomas G.

Ritch, Cornell University and Marietta College; John E. Parsons, as counsel for the appellants Bulkley and Vaughan, and certain appealing donees; William G. Choate, of counsel for certain other appealing donees; Charles M. Earle, of counsel for the Manhattan Dispensary; Henry Stoddard and Haley Fiske, of counsel for the President and Fellows of Yale College; and William Blaikie, of counsel for the widow and next of kin of Daniel B. Fayerweather, in support of said appeals, and James L. Bishop (with him on brief), Horace Russell, Elihu Root, Martin W. Cook and William B. Putney, of counsel for the plaintiffs and respondents; Alfred W.
121 Kiddell, of counsel for the Northwestern University, respondent; and William B. Hornblower (with him on brief), Howard A. Taylor and Austin Abbott, of counsel for Lincoln University and the Hampton Normal and Agricultural Institute, respondent; and due deliberation having been thereupon had, it is

Ordered, that the judgment appealed from be, and the same hereby is, affirmed with separate bills of costs to the respondents, payable out of the estate, to wit, to the Trustees of Amherst College, the Trustees of Dartmouth College, the Trustees of Hamilton College, the University of Rochester, the President and Trustees of Williams College, Bowdoin College, the Wesleyan University, Union Theological Seminary, Lafayette College, Lin-
122 coln University, the University of Virginia, the Hampton Normal and Agricultural Institute, Adelbert College, Park College, the Northwestern University, Marietta College.

Enter.

C. H. Van B.,

J.

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

Exhibit 7.

Judgment of General Term.

THE TRUSTEES OF AMHERST COLLEGE, The Trustees of Dartmouth College, The Trustees of Hamilton College, The University of Rochester, The President and Trustees of Williams College,

123 Plaintiffs,

against

THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN, individually and as Trustees and Executors of the Last Will and Testament, and Codicils thereto, of Daniel B. Fayerweather, deceased; Bowdoin College, The Union Theological Seminary, in the City of New York; Cornell University, Lincoln University, The Rector and Visitors of the University of Virginia, the Hampden Normal and Agricultural Institute, The Adelbert College of the Western Reserve University, Park College, John B. Reynolds and Morris B. Beardsley, as Executors of the Last
124 Will and Codicil of Lucy Fayerweather, deceased; Mary W. Achter, Emma S. Fayerweather, Lucy J. Beardsley, Anner Amelia Reynolds, Northwestern University, The Mt. Sinai Hospital, The Presbyterian Hospital in the City of New York, The Woman's Hospital in the State of New York, The Manhattan Eye and Ear Hospital, The New York Eye and Ear Infirmary, The Manhattan Dispensary, in the City of New York; The Montefiore Home for Chronic Invalids, The Methodist Episcopal Hospital, in the City of Brooklyn, New York; St. Luke's Hospital, in the City of New York; The New York Cancer

Hospital, The St. Vincent's Hospital, in the City of New York, The Trustees of Union College in the Town of Schenectady, in the State of New York; Haverford College, at Haverford College Post Office, Montgomery County, Penn.; The University of the City of New York, The University of Pennsylvania, The Brown University, of Providence, R. I.; The President and Fellows of Harvard University, Wesleyan University, at Middletown, Conn.; Princeton College, at New Brunswick, N. J.; Wells College, at Aurora, New York; Elmira Female College, Rutgers College, Vassar College, Poughkeepsie, New York; Barnard College, The Peter Cooper Union for the Advancement of Science and Art, The Shattuck School, at Faribault, Minnesota; Lafayette College, at Easton, Pa.; Maryville College, Trinity College, at Hartford, Conn.; Wabash College, Marietta College, The President and Fellows of Yale College, in New Haven, Conn.; The Trustees of Columbia College, in the City of New York, Defendants.

The appeals from the judgment entered in this action on the 31st day of December, 1894, having come on to be heard at a General Term of this Court, held at the City of New York, on the first Monday of May, 1895, and the plaintiffs appearing by Putney & Bishop, their attorneys, and the defendant Thomas G. Ritch appearing by Messrs. Arnoux, Ritch & Woodford, his attorneys; the defendants Justus L. Bulkley and Henry B. Vaughan, by Messrs Parsons, Shepard & Ogden, their attorneys; the defendants John B. Reynolds and Morris B. Beardsley, as executors of the last will and codicil of Lucy Fayerweather, deceased, and Mary W. Achter, Emma S. Fayerweather, by William Blaikie, Esq., their attorney; the defendant The President and Fellows of Yale College, New Haven, Conn., and Rutgers College, appearing by Haley Fiske, Esq., their

attorney; the defendant The Trustees of Columbia College, in the City of New York, appearing by John McL. Nash, Esq., its attorney; the defendant the Rector and Visitors of the University of Virginia, appearing by Robert C. Taylor, Esq., its attorney; the defendant the University of Pennsylvania and Haverford College, appearing by Robinson, Biddle & Ward, their attorneys; the defendant The Trustees of Union College, in the Town of Schenectady, in the State of New York, appearing by Chandler, Maxwell & Phillip, their attorneys; the defendant The New York Eye and Ear Infirmary, appearing by Messrs. Owen, Gray & Sturgis, its attorneys; the
127 defendant The Shattuck School, appearing by John R. McArthur, its attorney; the defendant Wells College, appearing by Underwood & Storke, its attorneys; the defendant Vassar College, appearing by Robert E. Taylor, its attorney; the defendant Manhattan Dispensary, appearing by Thornton, Earl & Kiendl, its attorneys; the defendant The Montefiore Home for Chronic Invalids, by Julius J. & A. Lyons, its attorneys; the defendant The Manhattan Eye and Ear Hospital, appering by Powell & Kroff, its attorneys; the defendant The Northwestern University, appearing by Redding & Kiddle, its attorneys; the defendant Lafayette College, appearing by Wager Swayne, Esq., its attorney; The Wesleyan University, appearing by Geo. G. & F. Rey-
128 nolds, its attorneys; the defendant Lincoln University, appearing by Hornblower, Byrne & Taylor, its attorneys; the defendant The President and Trustees of Bowdoin College, sued as Bowdoin College, by Butler, Stillman & Hubbard, its attorneys; the defendant Park College, by Clarke Brooks, Esq., its attorney; the defendant Maryville College and Wabash College, appearing by Messrs. Parsons, Shepard & Ogden, their attorneys; the defendant the Union Theological Seminary, by Adams & Comstock, its attorneys; the defendants Adelbert College, appearing by Scott & Upson, its attorneys; the defendants Marietta College and Cornell University, by Arnoux, Ritch & Woodford, their attorneys; the de-

fendant Trinity College, by Lockwood & Hill, its attorneys; the defendant the New York Cancer Hospital and the Peter Cooper Union for the Advancement of Science and Art, by John M. Perry, their attorney; the defendant the Methodist Episcopal College, by George S. Ingraham, Esq., its attorney; the defendant the University of the City of New York, by Bristow, Peet & Opdyke, its attorney; the defendants the Presbyterian Hospital, by DeForest Bros., Esqs., its attorneys; the defendant the Mt. Sinai Hospital, by Hoadly, Lauterbach & Johnson, its attorneys; the Trustees of the College of New
Jersey, at Princeton, by Alexander & Green, Esqs.,
129 its attorneys; the defendant the President and Fellows of Harvard University, by Evarts, Choate & Beaman, its attorneys; the defendant St. Vincent's Hospital, by Miller & Wells, its attorneys; the defendant St. Luke's Hospital, by William B. McVicker, its attorney; the defendant the Hampton Normal and Agricultural Institute, by James McGregor Smith, its attorney; the defendant Elmira Female College, by Arnoux, Ritch & Woodford, its attorneys; the defendant Barnard College, by Brownell & Lathrop, its attorneys; the defendants ths the Woman's Hospital and Brown University, by Hoppin & Talbot, their attorneys; Anner, Amelia Reynolds, by Byram L. Winters, her attorney.

Now, after hearing Elihu Root, Esq., and James L.
130 Bishop, Esq., of counsel on behalf of the respondents, and William Blaikie, Esq., of counsel on behalf of the executors of the last will and testament of Lucy Fayerweather, deceased, and the next of kin of Daniel B. Fayerweather, and Mary W. Achter and Emma S. Fayerweather, and John E. Parsons, Esq., of counsel for the appellants Bulkley and Vaughan, and Stewart L. Woodford, Esq., of counsel for the appellants, Thomas G. Ritch, individually and as one of the executors, Cornell University, Marietta College and Elmira Female College; and William G. Choate, Esq., of counsel for the donees under the deed of gift, and Charles M. Earle, Esq., of counsel for the Manhattan Dispensary, and Henry

Stoddard and Haley Fiske, Esq., of counsel for the President and Fellows of Yale College, and Alfred W. Kiddle, Esq., of counsel for the Northwestern University, and Austin Abbott, Esq., of counsel for the Hampton Normal and Agricultural Institute, and William B. Hornblower, of counsel for Lincoln University, and due deliberation thereon having been had, and the costs of the respondent the Trustees of Amherst College, having been adjusted at the sum of two hundred and fifty-six $\frac{25}{100}$ dollars, the Trustees of Dartmouth College at the sum of sixty dollars, the Trustees of Hamilton College at the sum of one hundred and one $\frac{71}{100}$ dollars, the University of Ro-
131 chester, at the sum of seventy dollars, the President and Trustees of Williams College at the sum of sixty dollars, of the Wesleyan University at Middletown, Conn., at the sum of sixty dollars, Lafayette College at Easton, Ga., at the sum of sixty dollars, of Bowdoin College at the sum of eighty-four $\frac{40}{100}$ dollars, the Union Theological Seminary at the sum of sixty dollars, of Lincoln University at the sum of sixty-nine $\frac{55}{100}$ dollars, the Rector and Visitors of the University of Virginia at the sum of sixty dollars, the Adelbert College of the Western Reserve University at the sum of sixty dollars, Park College at the sum of sixty dollars, the Hampton Normal and Agricultural Institute at the sum of sixty dollars, Marietta College at the sum of sixty $\frac{80}{100}$ dollars, the North-
132 western University at the sum of one hundred and sixty $\frac{90}{100}$ dollars.

It is adjudged and decreed, that the judgment so appealed from be and the same hereby is affirmed, and it is further

Adjudged, that the respondents the Trustees of Amherst College recover from the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan their costs as taxed, amounting to the sum of two hundred and fifty-six $\frac{25}{100}$ dollars, and that the trustees of Dartmouth College recover from the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan their costs as

taxed, amounting to the sum of sixty dollars, and that the respondent the Trustees of Hamilton College recover of the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan their costs as taxed, amounting to the sum of one hundred and one $\frac{71}{100}$ dollars, and that the respondent the University of Rochester recover from the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan their costs as taxed, amounting to the sum of seventy dollars, and that the respondent the President and Trustees of Williams College recover from the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan their costs as taxed, amount-
133 ing to the sum of sixty dollars, and that the respondent the Wesleyan University of Middletown, Connecticut, recover from the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan their costs as taxed, amounting to the sum of sixty dollars, and that the respondent the Union Theological Seminary recover of the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan their costs as taxed, amounting to the sum of sixty dollars, and that the respondent Lafayettee College recover from the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan their costs as taxed, amounting to the sum of sixty dollars, and that the respondent Lincoln University recover from the defendants Thomas G. Ritch, Justus L. Bulkley
134 and Henry B. Vaughan their costs as taxed, amounting to the sum of sixty-nine and $\frac{55}{100}$ dollars, and that the respondent the Rector and Visitors of the University of Virginia recover from the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan their costs as taxed, amounting to the sum of sixty dollars, and that the respondent The Hampton Normal and Agricultural University recover from the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan their costs as taxed, amounting to the sum of sixty dollars, and that the respondent Adelbert College of the Western Reserve University recover from the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan their costs as

taxed, amounting to the sum of sixty dollars, and that the respondent Park College recover from the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan their costs as taxed, amounting to the sum of sixty dollars, and that the respondent the Northwestern University recover from the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan their costs as taxed, amounting to the sum of one hundred and sixty $\frac{90}{100}$ dollars, and that the respondent Marietta College recover from the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan their costs as taxed, amounting to the sum of sixty $\frac{50}{100}$ dollars, and that
135 the respondent Bowdoin College recover from the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan their costs as taxed, amounting to the sum of eighty-four $\frac{40}{100}$ dollars, each of which sums are to be paid out of the estate of Daniel B. Fayerweather, deceased, and for each of which judgment is given against said Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan as executors of the last will and testament of Daniel B. Fayerweather, deceased.

HENRY D. PURROY,
Clerk.

136

TRUSTEES OF AMHERST COLLEGE *et al.*
Respondents,
vs.
THOMAS G. RITCH, *et al.*,
Appellants.

Exhibit 8.
Opinions of Court of Appeals.

137

VANN, *J.*—The appellants are of two classes, each hostile to the other and both hostile to the plaintiffs, who, with certain of the defendants, are respondents. One class comprises the executors of the widow and the next of kin, with the exception of Mrs. Beardsley, who unite in claiming that there was a secret trust in favor of the colleges named in the ninth article of the will, or of beneficiaries to be appointed by Messrs. Ritch, Bulkley and Vaughan, created by the gift of the residuary estate to those gentlemen in connection with their promises to the testator to turn over their legacy to such colleges or beneficiaries; that this trust was void as an invasion
138 of the statute of 1860, or for indefiniteness, or both, except to the extent of the difference between the sum of $2,195,000, specifically given to colleges and hospitals, and one-half of the estate after payment of debts; that the deed of gift was void as a fraud upon the testator, the twenty colleges, the act of 1860 and the widow and next of kin; that the releases executed by the widow and next of kin were void, because they were procured by fraud, and that hence the executors of the widow and the next of kin are entitled to that part of the residuary estate which, owing to the partial failure of the secret trust, was not disposed of by the will or codicils, but passed under

the Statutes of Descents and Distributions as assets neither devised nor bequeathed.

The other class of appellants includes the residuary legatees and their donees under the deed of gift, who claim that the legacy of the tenth article was absolute, although made with an expectation on the part of the testator that the residuary legatees would apply it in accordance with what they believed to be his wishes; and that, hence, the deed of gift was effective and the donees thereunder entitled to receive accordingly. Said donees further claim, for themselves, that if the residuary legatees were guilty of fraud, express or implied, in pro-
139 curing the will and were thereby precluded from taking an absolute title, they held the gift for the benefit of the widow and next of kin, to whom it equitably belonged, and that the law would not fasten upon the fund an equitable obligation or trust to devote it to a purpose in violation of the law itself as expressed in the act of 1860; that the releases executed by the widow and next of kin to the residuary legatees operated as transfers, and not only made the original title of the latter complete, but confirmed the title conferred by them upon the donees under the deed of gift. They also insist that the plaintiffs are estopped, by encouraging and uniting in a settlement made with the widow and next of kin, from asserting a claim that would render that settlement of no value to those who parted with value in
140 order to make it, and that an adjudication of the Surrogate, made in a special proceeding under the Collateral Inheritance Act, is a bar to this action.

The respondents, being the plaintiffs and certain defendants who stand with them, are, with some exceptions, the colleges named in the ninth article of the will. Their claim is that the testator intended that the residuum of his estate should go to those colleges; that he would not have made the gift to the residuary legatees had he not been assured by them, or in their behalf, that they would thus dispose of their legacy; that, hence, the residuary lagatees were under an equitable obligation to so dispose

of it; that they had no right to disappoint his belief, based on their promises, which induced him to thus make his will, by disposing of the property through the deed of gift, which is, therefore, of no effect; that there was no violation of the statute of 1860 in fact, but, if there was, no one can take advantage of it but the widow and next of kin, who, by their releases, waived all the rights derived from that statute, and, hence, that the settlement made with them inures to the benefit of the colleges named in the ninth article of the will, which thus became entitled to the residuary estate.

141 1. The first question presented for decision is, what facts may we assume to have been found by the courts below, whether expressed in words or not. The Code of Civil Procedure provides that "the decision of the Court or the report of a referee upon the trial of the whole issue of fact may state separately the facts found and the conclusions of law and direct the judgment to be entered thereon; or the Court or referee may file a decision stating concisely the grounds upon which the issues have been decided and direct the judgment to be entered thereon" (Code Civ. Pro., §1022). Although the decision by the Special Term and the affirmance by the General Term were general in form, necessarily some facts were found by those courts, even if they are not specified
142 in the record. Otherwise, the burden of deciding questions of fact would be cast upon this Court, which has jurisdiction to decide only questions of law. We think that the effect of a decision by the trial Court without expressing the facts found is the same as if there had been a general verdict rendered by a jury, and that the same presumptions arise in its support. When a judgment entered upon a verdict has been affirmed by the General Term, this Court can look into the evidence only to ascertain whether there were any facts proved upon which the jury could base their verdict (*Hazman vs. Hoboken Land & Imp. Co.*, 50 N. Y., 53, 55). If, upon such examination, the Court finds that there is some evidence

to sustain the verdict, and that upon any view of the facts the verdict can be upheld, it will not interfere with the determination of the General Term affirming the judgment, even when it might, if it had the power to determine the questions of fact embraced in the verdict, have reached a conclusion other than that reached by the jury (*Maher vs. Cent. Park R. R. Co.*, 67 N. Y., 52, 55). Where the affirmance is by an Appellate Division and is unanimous, we have no power to examine the record even to see if there is any evidence to sustain the verdict (*Szuchy vs. Hillside Coal & Iron Co.* 150 N. Y., 219-222). We are of the opinion, therefore, that where the decision of the Special Term does not state the facts found,
143 and the judgment entered thereon has been affirmed by the General Term, upon an appeal to this Court, all the facts, alleged in the complaint, warranted by the evidence and necessary to support the judgments below, are presumed to have been found. Hence, upon such an appeal, we have no more control over the facts than we have when specific findings are made by the Special Term and affirmed by the General Term. This conclusion takes the question as to the fraud alleged to have been practiced by the residuary legatees upon the widow and next of kin in procuring the releases out of the case, for it cannot be said on the record before us that the evidence tending to show fraud is so irresistible as to make the omission to find fraud an error of law. Assuming that there was
144 evidence enough to warrant the inference of fraud, there was also ample evidence to warrant the inference there was no fraud. A question of fact was thus presented which is beyond our power of review. The only ground upon which it is claimed that the alleged fraud was so conclusively proved as not to involve a question of fact is that the residuary legatees did not state that there was a secret trust in favor of the colleges named in the ninth article of the will, and that the effect of that trust was to vest the bulk of the residuary estate in the widow and next of kin. What are the facts? The residuary legatees were engaged in settling a lawsuit with hostile

parties, toward whom they sustained no fiduciary relation, and who were represented by counsel of the highest standing and ability. Substantially all of the material facts had been disclosed by the evidence taken during the trial, in which both parties to the releases were then engaged. The residuary legatees had been examined at length upon the witness stand by counsel for the widow and next of kin, who had ample opportunity to make full discovery. While they took the position, to which they still adhere, that the gift to them was absolute, that position was not acquiesced in by the widow and nieces, for their counsel openly claimed and argued in Surrogate's Court that there was a secret trust, which was invalid,
145 and that their clients were entitled to the residuary estate. While there may have been concealment of opinions, there was no concealment of facts upon which those opinions were based. The residuary legatees were not bound to volunteer their opinions, even if they then thought there was a secret trust. One who is trying to settle litigation has the right to keep his opinion on the merits to himself. The controversy as to whether there was a secret trust or not, as well as the contest over the probate of the will, was fairly covered by the terms of the releases so far as the parties to those instruments were concerned. They dealt with each other, at arm's length, as adversary parties, knowing the substantial facts, and they are presumed to have had them in mind when
146 the releases were executed, and to have covered by the language used all questions to which those facts could give rise. Even if we hold, when we reach the question, that there was a secret trust, that will not convict the residuary legatees of fraud in claiming the contrary before the Surrogate, for one who neither withholds nor misstates the facts cannot be adjudged guilty of fraud simply because the courts finally decide the law to be other than he claimed it to be while engaged in litigation over the subject. Such a rule would make nearly every unsuccessful litigant guilty of fraud. From this statement it is obvious that there was no such concealment as

would require the Court, if the trial were before a jury, to direct a verdict on the basis of fraud proved beyond question. Our conclusion is that the executors of the widow and the nieces have no standing upon this appeal; so that the contest is narrowed to the other conflicting claimants, one class resting their claims upon the deed of gift and the releases, and the other upon the will, the secret trust and the releases.

2. The next question in the natural order of discussion is whether there was a secret trust.

While a testator may make a gift to a legatee solely for the purpose of enabling him, if he sees fit, to dis-
147 pose of it in a particular way, still, if there is no promise by him, either express or implied, to so dispose of it, and the matter is left wholly to his will and discretion, no secret trust is created, and he may, if he chooses, apply the legacy to his own use. When it clearly appears that no trust was intended, even if it is equally clear that the testator expected that the gift would be applied in accordance with his known wishes, the legatee, if he has made no promise, and none has been made in his behalf, takes an absolute title and can do what he pleases with the gift. Whatever moral obligation there may be, no legal obligation rests upon him. On the other hand, if the testator is induced either to make a will or not to change one after it is made, by
148 a promise, express or implied, on the part of a legatee that he will devote his legacy to a certain lawful purpose, a secret trust is created, and equity will compel him to apply property thus obtained in accordance with his promise (*O'Hara vs. Dudley*, 95 N. Y., 403; *Brown vs. Lynch*, 1 Paige, 147; *Dowd vs. Tucker*, 41 Conn., 197; *De Laurencel vs. De Boom*, 48 Cal., 581; *Browne vs. Browne*, 1 H. & J., 430; *Church vs. Ruland*, 64 Penn. St., 442; *Towles vs. Burton*, 24 Am. Dec., 409; *McLellan vs. McLean*, 2 Head, 684; *Russell vs. Jackson*, 10 Hare, 202; *Thynn vs. Thynn*, 1 Vern., 296; *Reech vs. Kennegal*, 1 Ves. Sr., 124; *Wallgrave vs. Tebbs*, 2 K. & J.,

321; *McCormick vs. Grogan*, L. R., 5 Eng., & Ir. App., 82). The trust springs from the intention of the testator and the promise of the legatee. The same rule applies to heirs and next of kin who induce their ancestor or relative not to make a will by promising, in case his property falls to them through intestacy, to dispose of it, or a part of it, in the manner indicated by him (*Williams vs. Fitch*, 18 N. Y., 546; *Grant vs. Bradstreet*, 87 Me., 583; *Gilpatrick vs. Gladden*, 81 Me., 137). The rule is founded on the principle that the legacy would not have been given, or intestacy allowed to ensue, unless the promise had been made, and, hence, the person prom-
149 ising is bound in equity to keep it, as to violate it would be fraud. While a promise is essential it need not be expressly made, for active co-operation or silent acquiesence may have the same effect as an express promise. If a legatee knows what the testator expects of him, and having an opportunity to speak, says nothing, it may be equivalent to a promise, provided the testator acts upon it. Whenever it appears that the testator was prevented from action by the action or silence of a legatee, who knew the facts in time to act or speak, he will not be permitted to apply the legacy to his own use when that would defeat the expectations of the testator. As was said by this Court in the O'Hara case (*supra*): "It mat-
150 ters little that McCue did not make in words a formal and express promise. Everything that he said and everything that he did was full of that interpretation. When the testatrix was told that the legal effect of the will was such that the legatees could divert the fund to their own use, which was a statement of their power, she was told also that she would only have their honor and conscience on which to rely, and answered that she could trust them, which was an assertion of their duty. Where in such cases the legatee even by silent acquiesence encourages the testatrix to make a bequest to him, to be by him applied for the benefit of others, it has all the force and effect of an express promise." The trust does not act directly upon the will by modifying the gift, for the

law requires wills to be wholly in writing, but it acts upon the gift itself as it reaches the possession of the legatee, or as soon as he is entitled to receive it. The theory is that the will has full effect by passing an absolute legacy to the legatee, and that then equity, in order to defeat fraud, raises a trust in favor of those intended to be benefitted by the testator, and compels the legatee, as a trustee *ex maleficio*, to turn over the gift to them. The law, not the will, fastens the trust upon the fund by requiring the legatee to act in accordance with the instructions of the testator and his own promise. Neither the Statute of Frauds nor the Statute of Wills applies,
151 because the will takes effect as written and proved, but to promote justice and prevent wrong the courts compel the legatee to dispose of his gift in accordance with equity and good conscience. As was well said in Wallgrave *vs.* Tebbs (*supra*):

"Where a person knowing that a testator, in making a disposition in his favor, intends it to be applied for purposes other than his own benefit. either expressly promises or by silence implies that he will carry the testator's intention into effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust; and in such a case the Court will not allow the devisee to set up the Statute of Frauds—or rather the Statute of Wills, by which the Statute of
152 Frauds is now in this respect surperseded, and for the reason that the devisee by his conduct has induced the testator to leave him the property; and, as Lord Justice Turner says in Russell *vs.* Jackson, no one can doubt that if the devisee had stated that he would not carry into effect the intentions of the testator, the disposition in his favor would not have been found in the will. But in this the Court does not violate the spirit of the statute, but for the same end, namely, prevention of fraud, engrafts the trust on the devise by admitting evidence, which the statute would in terms exclude, in order to prevent a party from applying property to a purpose foreign to that for which he undertook to hold it."

When these rules are applied to the case before us it can hardly be open to question that there was a secret trust attached to the gift of the residuary legatees. The testator, by the tenth article of his will, created an express trust for the benefit of the colleges named in the ninth. He knew, however, that the trust could not be carried into effect if his widow and nieces tried to prevent it. He, therefore, appealed to their forbearance by means of the first memorandum, in which he speaks of making his will after advice from counsel as to the restrictions imposed by the law of this State in regard to benevolent corporations. He evidently referred to the statute of
153 1860, and acting upon the belief that it would render the tenth article inoperative, except through their mercy, he begged them "to permit the provisions of" his "will to be carried into effect." In a few months he became convinced that the mercy of his heirs was a frail reliance, so by his first codicil he revoked the tenth article and substituted in its place an absolute gift to Messrs. Bulkley and Ritch. Having withdrawn his appeal to the forbearance of his heirs, he next appealed to the honor of his residuary legatees by preparing a second memorandum, in which he said that he had made them such, "in the confidence that thereby" his intentions as expressed in his will would be carried into effect without litigation on the part of any one. The circumstances show that
154 by his intentions as expressed in his will he meant his intentions as expressed in the tenth article thereof, and that the word "thereby" refers to the gift absolute in form, made by the first codicil. This is made clear by the last sentence of the memorandum, in which he asks the residuary legatees to "take such steps by will or otherwise as will protect" his "estate against the contingency of the death of either before" his "estate is settled and distributed." If the gift was absolute, as it purported to be, what protection did his estate need in case either of the residuary legatees should die? Did he not mean that while he was willing to trust them, he was not willing to trust their heirs, and, hence, wanted the

protection of a will? By the third memorandum, made several years later, he assumed that there was an obligation on the part of the residuary legatees to dispose of their gift in accordance with his wishes. This appears on the face of the paper itself, though he was careful not to give directions, but only to make suggestions. They related, however, to his property and to the method of distributing that part which he had apparently given to them absolutely. He showed no change of intention when he made the Butler codicil, restoring the express trust as created by the tenth article, nor when he made his fourth codicil a few days later, renewing the ab-
155 solute gift and adding Mr. Vaughan as one of the residuary legatees. The final gift, whether absolute in form or expressly in trust, was always to the same end. The changes made emphasize the intention and point to a single object. No satisfactory reason has been given for making those changes except that at different times he preferred different methods to accomplish the same thing. By every line he ever wrote and by every word he ever spoke, so far as the courts below permit us to hear them, he showed the same persistent, steadfast and unchangeable purpose to benefit the twenty colleges named in the ninth article of the will, except as he may have modified his original purpose by an extension of the trust so as to include the Northwestern University as indicated in
156 the last memorandum. The will, codicils and memoranda, the letter to Mr. Ritch asking how his residuary estate would go in case of his death, and all the facts, as they are presumed to have been found by the courts below, establish the same fixed and constant purpose. Those facts appear so fully in their chronological order, in the statement annexed to this opinion, that further allusion to them will not now be made.

The intention of the testator being thus clear, the secret trust was completed by the promise made by or on behalf of the residuary legatees. As the gift was to them as tenents in common, a promise that bound all was necessary in order to include each of the three shares. That

Mr. Ritch and Mr. Vaughan duly promised appears so conclusively from their conduct, letters and statements to the testator, that we do not regard any further expression of our views upon the subject as necessary. It is, however, strenuously urged that Mr. Bulkley made no promise, and hence that the secret trust did not extend to his share of the gift. If he were the only residuary legatee the question would be more serious, but he was not. The trial Court found that Messrs. Ritch and Vaughan promised for themselves and for Mr. Bulkley, and the evidence plainly warrants this conclusion. The General Term, in its opinion, went further and declared that there was
157 an understanding between Mr. Bulkley and the testator to the same effect, but the evidence to sustain this conclusion is meagre, although we do not hold it was insufficient. Assuming, however, that Mr. Bulkley made no promise, still we think that he was bound, under the circumstances, by the promise made in his behalf, and that he cannot profit by the action of his co-tenants in making the promise for him, as that would be a fraud. He was not a purchaser; he furnished no consideration; there was no contract for his benefit; he was in the attitude of accepting a gift pure and simple, but that gift was made in reliance upon a promise given in his behalf. Can he violate the promise and fairly take that which came to him solely on account of the promise, even if
158 it was not made or authorized by him? We think not, because his title came through the promise, and by accepting the gift he ratified the promise. He must repudiate the gift or accept the responsibility. While the cases are not uniform, the weight of authority sustains this conclusion (*Hooker vs. Axford*, 33 Mich., 453; *Moss vs. Cooper*, 1 J. & H., 367; *Tee vs. Ferris*, 2 J. & K., 357; *King's Estate*, 21 Irish Law Rep., 273; *O'Hara vs. Dudley, supra*). In the case last cited this Court said: "So far then, as McCue is concerned, he stands in the attitude of having procured and induced the testatrix to make a devise or bequest to himself and his associates by asserting its necessity, and promising faithfully to

carry out the charitable purposes for which it was made, and whether his associates knew or promised, or did not, makes no difference where the devise is to them as joint tenants, and all must get their rights through the result accomplished by one." Although the devise in that case was to joint tenants, the principle that "all must get their rights through the result accomplished by one" is broad and equitable, and should not be limited to the technicality of a joint tenancy as distinguished from a tenancy in common, where, as in this case, the promise was made by two in behalf of themselves and another,
and a devise thus obtained to the three. This rule
159 prevents fraud, which is the primary object of the
courts in enforcing secret trusts, while any other would promote fraud. We thus reach the conclusion that there was a secret trust that bound all of the residuary legatees.

3. What was the trust? While at first, by the will, it was expressly for the benefit of the ninth article colleges, after the first codicil, although not so expressed, it was for the benefit of the same. So far as any writing signed by the testator shows, it always continued so, except as it may have been modified by the private memorandum of March 22, 1889, in relation to the Northwestern Univer-
sity and others. That does not purport to do away
160 with prior instructions, but is in the nature of sug-
gestions to guide under the discretionary clause to withhold or reduce, in the ninth article of the will. It is advisory, but not obligatory. There are no words of direction, but all are of opinion, judgment and desire, as if the writer was making a recommendation for consideration, but not necessarily for action. Thus he says: "It is my judgment," "I think," "I would recommend," "I suggest," and "I also wish." If he intended to give directions why did he not embody them in one of the two codicils that he made after the date of the memorandum in question? But whether the words are regarded as absolute or discretionary, they do not invalidate the original

promise, nor do they render the trust indefinite. The promise of the legatees kept pace with the testator's instructions and is to be considered, in the light of all that transpired, not only on the last occasion, but on all previous occasions. When Mr. Fayerweather handed the memorandum to Mr. Ritch, who knew its contents, his silence under the circumstances was a promise to conform to whatever directions it may have contained, because if he did not intend to comply, it was his duty to say so. If it operates as an extension of the trust, as held by the courts below, and of which no complaint is made by any party to this appeal, still the modification is clear and
161 definite and in no way affects the validity of the trust. It acts as a modification simply. We, therefore, have a trust for the benefit for the ninth article colleges, as modified, perhaps, by the last memorandum, with definite beneficiaries each capable of asserting itself as such.

It is, however, insisted that the testator in certain conversations with Mr. Ritch and Mr. Vaughan so modified his instructions, which their implied promise would follow, as to include other institutions of learning that were to be selected by the residuary legatees. If such a modification was made it rendered the trust void for indefiniteness, because it would be incapable of enforcement through the want of specified beneficiaries who would
162 call upon the executors for performance. There is no conversation with Mr. Ritch, appearing in the record, which compels the conclusion, in view of the action of the Courts below, that any modification was made by Mr. Fayerweather. A change of intention should appear with the utmost clearness in order to destroy the legal effect of writings signed by the testator and filed for preservation. Such a change will not be sought for in a loose and general conversation, especially when it does not appear in writings upon the subject subsequently made. Some conversations were sworn to by Mr. Vaughan, which would justify a finding that instructions were given making the secret trust indefinite, but they would also justify the

finding that they were merely instructions for still another codicil, not drawn, because death came so soon, the last having been hurriedly made to effect the main purpose, or a suggestion as to a change of existing beneficiaries, or the addition of others to be thereafter specified but not then determined upon. The presumption is that the trial Court drew the latter inference; but there is a more radical answer to the claim that the secret trust was made indefinite by conversations with Mr. Vaughan, because the trial Court was not bound to believe, and from the record before us is presumed not to have believed that the alleged conversation ever took place. Mr.
163 Vaughan, although without mercenary interest, was an interested party, under the temptation to so testify as to relieve himself from the obligation to comply with the secret trust and to justify his action in executing the deed of gift. He rested under the imputation of selfishly raising suspicions in the mind of the testator against Mr. Ritch until he was himself made one of the legatees, when he suddenly became satisfied with Mr. Ritch's honesty and proclaimed that he was "all right." He was not entirely candid either with Mr. Ritch or Mr. Fayerweather. He told Mr. Ritch on an important occasion that the testator was too ill to be seen, when that served his own purpose, although he himself saw him al-
most every day on business of the utmost moment,
164 and he did not deliver Mr. Ritch's honorable and specific letter to Mr. Fayerweather when he had impliedly undertaken to do so. He did not produce the envelope upon which the memorandum as to "more institutions for benefit" is said to have been made until a late day, nor did he swear upon the trial before the Surrogate to the conversation alleged to have been had with the testator during his last hours. He was contradicted by Miss Joyce, who denied in effect that that conversation took place, and his conduct toward that lady, when he shook his fist in her face and said that he would spend the entire estate, together with his own fortune, if necessary, to succeed in the litigation then pending, shows the deep in-

terest that he took in the will and the rights that he claimed under it. There was not such clearness of memory, frankness of disclosure or freedom from interest as to make his testimony conclusive. Under these circumstances the trial Court was not bound by Mr. Vaughan's testimony, and the presumption is that the Courts below rejected it so far as that presumption is necessary to sustain the judgments that they rendered.

We thus have a secret trust created by the instructions of the testator, and the promise of the legatees based thereon, with definite beneficiaries, and in every respect capable of enforcement, but for the Act of 1860, en-
165 titled "An act relating to wills," which provides as follows:

"No person having a husband, wife, child or parent shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate after the payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half and no more. All laws and parts of laws inconsistent with this act are hereby repealed" (L. 1860, Ch. 360). The manifest effect of this statute was to arrest the design of Mr. Fayerweather and to prevent it from being
166 carried into effect, at least without the consent of his widow and nieces. The legal title to the residuary gift was still in the legatees, however, for the will stood as proved, and as proved the gift was absolute in form. There was nothing in the will itself to confer an equitable title upon any one. Owing to facts outside of the will, a secret trust for the twenty colleges arose, but their equitable title was interfered with by the statute. The rights of the widow and next of kin, founded on the statute, sprang into being, and an equitable title became vested in them, so that they could call upon the residuary legatees to account for that part of the residuary estate which, by command of the law, Mr. Fayerweather

could not give to literary corporations by will so long as he had a wife.

4. The effect of the releases in connection with the Statute of 1860 now requires consideration.

There are authorities which hold that the rights arising from such a secret trust as we have been discussing are not testamentary in character, because the trust does not act upon the will, but on the fund after it reaches the hands of the legatees (*Harris vs. Howell*, Gilb. Eq. R., 11; *Addington vs. Camp*, 3 Atk., 141; *Rockwood's Case*, Cro, Eliz., 164; *Chester vs. Urwick*, 23 Beav., 407; 167 *Re Rogers*, L. R. [26 Ch. Div.], 531; *Cullen vs. Atty.-General*, 14 Irish, C. L. R., 137; *Olliffe vs. Wells*, 139 Mass., 221; *Hoge vs. Hoge*, 1 Watts [Pa]. 163; *Re Kelman*, 126 N. Y., 73; *Williams vs. Fitch*, *supra*). Founded on these authorities, the argument is made by some of the respondents that the statute does not apply to this case, because the colleges do not claim under the will, or anything found in it, but on facts wholly outside of it. They insist that the same reason that takes a secret trust away from the Statute of Wills and of Frauds takes it away from the Act of 1860, and that their rights do not spring from the mode of changing title, but out of the duty of those who hold the title. They illustrate their argument by saying that if A wills B $10,000, 168 and writes him a letter saying that the legacy is in trust for C but the letter is not delivered until after A's death, there is no trust; but if the letter is delivered before A dies and B promises to perform, there is a trust. Although the will is the same in both cases, in the one B takes and in the other C, because the former takes from the will and the latter from the trust. The argument is not without force when applied to a trust that does not run foul of a statute.

When, however, as in this case, the trust is a manifest evasion of a statute, sound public policy forbids that the testator should be permitted to effect indirectly that which he could not effect directly, at least until all in-

tervening rights derived from the statute have been lawfully cleared away, We think that the act of 1860 applies, but to what extent and how it was affected by the releases, we will proceed to consider.

The statute in question is not a Mortmain act. The policy of the State upon that subject appears in a few general and many special statutes passed at various times. The Revised Statutes present an example of the former when they provide that "no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise" (2 R. S., 57, §3). The charters of various corporations illus-
169 trate the other class of legislation by limiting the amount they can take by devise or otherwise (*Matter of McGraw*, 111 N. Y., 66, 107). The object of all these statutes is to "prevent accumulation of property in the hands of institutions which take no part in the productive activity of the community." They act upon the power of corporations to take and hold, not on the power of a testator to give. The authorities relied upon by the appellants are to a great extent judgments pronounced when these statutes, thus expressing the policy of the State against the concentration of weath *in mortua manu*, were under consideration by the courts. The decisions under the Mortmain acts of England are equally inapplicable,
when the difference between those acts and the Act
170 of 1860 is borne in mind. That statute is of a different character from any of those mentioned. It does not prevent charitable corporations from taking, but forbids a testator who has a wife, child or parent from giving more than one-half of his estate after the payment of his debts (*Chamberlain vs. Chamberlain*, 43 N. Y., 424, 440). It does not prohibit charitable gifts altogether, but only under certain circumstances, to a certain extent and by a certain method. If the gift is not made by will or if made by will and the testator leaves no surviving relatives of the degree named, or it is to charities other than those mentioned, there is no prohibition. It does not compel a testator to leave his property or any part thereof

to relatives. It does not prevent him from giving all that he has to charity during his lifetime. It is aimed simply at the giving of an undue proportion to charity by will, when certain near relations have, in the opinion of the Legislature, a better claim. As was said by Judge Allen in *Chamberlain vs. Chamberlain* (43 N. Y., 424, 440), its object "was to prevent a person upon whom others standing in near relation had claims, from disappointing their just expectations and disinheriting them from pious or philanthropic motives, and the intent was to include all public objects, whether religions, charitable or literary."

Its theory is not to keep property away from chari-
171 table corporations, but to prevent a testator from giving them more than one-half of his net estate at the expense of his wife, child or parent. Its sole purpose is to protect those natural objects of his bounty from improvident gifts to their neglect. It does not attempt to prescribe the amount or kind of property that the corporations can hold, or to place any limit upon their corporate powers. Its mandate is addressed to testators, not to corporations, which are mentioned only to partly measure the extent of the command. It points toward no public interest, but toward the prevention of what the Legislature regarded as a private wrong. It was passed for the benefit of the persons named in it, not for the benefit of the people at large as a measure of State polity.

172 Indeed the State has no policy against institutions of charity or learning. Throughout its history it has shown a deep interest in promoting such objects and in encouraging its citizens to help them. Aid to education has always been a prominent feature in its legislation. Never has it repelled and uniformly has it invited the cooperation of individuals and corporations to that end. As was said by this court in a late case, "It is not against public policy to allow gifts to charitable, benevolent, scientific or educational institutions. The law allows and encourages such gifts and those who make them are commended as the benefactors of their race. Such institutions, dotted all over our land to succor, elevate, educate

men and ameliorate their condition, are distinguishing features of our modern civilization" (*Hollis vs. Drew Theological Seminary*, 95 N. Y. 166, 172).

We are led by this reasoning, based upon an analysis of the statute and a comparison of its provisions with those of Mortmain statutes, to the conclusion, which is in substantial accord with the authorities so far as they have been called to our attention, that only the persons named in the act and those benefited through them, can invoke its protection. The State through its Attorney-General cannot by legal proceedings raise the question or prevent
the gift from taking effect in accordance with the
173 wishes of the testator. The rights springing from
the statute are personal, the same as the rights of a borrower under the Statute of Usury. and they can be waived or relinquished in the same way (*Williams vs. Tilt*, 36 N. Y., 319, 325; *Smith vs. Marvin*, 27 N. Y., 137, 143). While the one was passed to protect the family of the testator and the other to protect the estate of the borrower, and both prohibit certain acts, we see no reason why the benefit derived from the prohibition may not be abandoned in the one case the same as in the other (Endlich's Interpretation of Statutes, 360). The command that the gift shall not be "valid" is no more imperative than the declaration that the usurious security
shall be "void," While it has been held that the
174 prohibition of the statute of 1860 may be insisted
upon by any person who would derive a benefit therefrom, although not one of those named therein, this simply extends the list of such as have rights to waive or retain at their election (*Harris vs. Am. Bible So.*, 4 Abb. Pr. [N. S.] 421). The widow and next of kin for whose benefit the statute, as applied to this case, was passed, could, prior to the execution of the releases by them, have asked the courts to enforce it, and award them their equitable rights against the residuary legatees as their trustees. No one else could set the courts in motion or the statute in operation. The residuary legatees could not, either in their own interest or in the interests of

those to whom they had assumed to give nearly one-half of the estate left by the testator, in violation of their promise to him and the secret trust resulting therefrom. That would make the statute an aid to fraud, and would defeat both its own purpose and that of the testator (*Ryan vs. Dox*, 34 N. Y., 307, 312). The donees under the deed of gift are in no better position than the donors, for they stand in the same shoes. There was nothing, therefore, to prevent the widow and next of kin from reviving the secret trust by settling with the trustees and canceling their own claims. Whether they did so or not depends upon the nature of the releases, which were
175 of two kinds, one preliminary, the other permanent; but both having the same object. The first, after withdrawing all objections to the probate of the will, contains a covenant not to sue for a construction of the will, or to set the will aside and not to make any claim upon the residuary legatees, as such or as executors. It also contains an agreement to "execute a general release of all claims," both to the executors and their donees, under the deed of gift, as well as to Messrs. Bulkley, Ritch and Vaughan individually.

The second, which was executed after payment of the consideration provided for by the first, runs to the persons last named, as executors, trustees, individuals, and as representatives of the donees under the deed of
176 gift, and, after reciting that the amount paid "is in compromise and full settlement of any and all contests * * * of the will of said Daniel B. Fayerweather, or concerning his estate," each covenantor says I have "remised, released and forever discharged, and by these presents do for myself and for my heirs, administrators and executors, remise, release and forever discharge," the said persons in their said several capacities, "and also the said donees" mentioned in the deed of gift, "of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, claim and demands whatsoever, in law or in equity, which against the said persons or corporations, or

any of them, I ever had, or now have, or which I or my heirs, executors or administrators hereinafter shall, can or may have, for, upon or by reason of any matter, cause or thing whatsoever."

Two theories are pressed upon our attention as to the effect of these instruments. One is that they operate not only as releases, but also as transfers, and the other that they are releases pure and simple. The theory of the donees under the deed of gift that either paper is an assignment seems to be an afterthought, for it is not set up in their answers and is said not to have been suggested before either of the Courts below. The answers deny
177 the facts out of which a resulting interest for the widow and nieces arises, and the most of them allege affirmatively that "said Ritch, Bulkley and Vaughan were and are absolutely devisees and legatees in their own right, as individuals, of the entire residuary estate of said Mr. Fayerweather, and could dispose of the same as they saw fit; that the deed of gift mentioned in the complaint was duly made, executed and delivered, and is a valid instrument, and in fact and in law passed to various persons and institutions named therein all that said Bulkley, Ritch and Vaughan took as aforesaid as absolute devisees and legatees." While reviewing Courts have power on appeal to so amend the pleadings as to conform to the proofs in order to affirm a judgment, no such power
178 exists for the purpose of reversing a judgment (*Volkening vs. De Graaf*, 81 N. Y., 263, 272). An analysis of the instruments of release, which are quite full and formal, as releases, shows that they contain no word ordinarily used to affect an assignment or transfer. The first, which is operative without the sscond, contains no word that is ever used for that purpose, when the connection in which it appears is taken into account. On the other hand, its language is precisely adapted to effect a settlement of the litigation pending and threatened when it was executed, by terminating the contest over the will and providing that no other contest for any purpose should be begun by those signing the paper. The situa-

tion then was that the legal title to the residuary estate was in Messrs. Bulkley, Ritch and Vaughan, and that by virtue of the secret trust and the Act of 1860, the widow and next of kin had the right to call upon those gentlemen to account for the residuary estate, or, in other words, to bring a suit in equity against them as trustees *ex maleficio* for an accounting. The words used in the first paper, therefore, were fit and proper to waive and extinguish the right of the widow and next of kin to bring such a suit in equity, but were neither fit nor proper, nor can they by any reasonable construction be said to have the effect to transfer or assign anything
179 to any one. The concluding words corroborate this theory, for they are a promise "to exeeute a general release of all claims" to the executors and to their donees, but not to transfer anything to either. While the word "release" is sometimes used in conveyancing to transfer a title, its general meaning is to surrender a right or to discharge a liability, and when it is used in connection with the word "claims," as it is in the pape. under consideration, it never has any other meaning than that of waiver, surrender or relinquishment. No right of action can pass by a release of all causes of action.

Since the first paper was effective as a release, and as a release only, all the rights springing from it came into existence at once upon its execution and delivery,
I80 and could not be changed or cut down by any paper subsequently executed by the widow and nieces. They had extinguished their claims forever, and the agreement to execute a general release did not permit, at least as to third parties whose rights had intervened, the insertion of words therein changing, or purporting to change, the effect of the first instrument, and we do not think that any attempt was made to do so. The second paper was "in compromise and full settlement" of all contests connected with the will or concerning the estate. That was the object of the paper as stated in connection with the consideration, which was not meritorious as to the donees under the deed of gift, but was furnished, in-

directly, by the ninth article colleges. In order to effect this object the releasors "remised, released and forever discharged" the persons and corporations named. But what do they remise, release and discharge them from, for they do not remise or release any property "to" any one, as is usual when a transfer is made? The answer is found in these words of the instrument, viz.: "Of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, claims and demands whatsoever in law or in equity," etc. So far as the intention of the parties to these writings is a question of fact, or is it at all dependent on extrin-
181 sic facts subject to opposing inferences, it is presumed to have been found in favor of the respondents. Do the parties to a full and formal instrument intend to assign when they use no word importing an assignment? Is it probable that there was an intention to assign anything to the same persons in four different capacities, as individuals, executors, trustees and as representatives of the donees? How could such an assignment be enforced? A release, however, to them in all those capacities was precisely what they needed in order to be fully protected. "In a struggle between the heir or trustees whom the testator obviously did not intend to benefit, and a charity which he confessedly designed to endow, a court of equity will lend its aid to the extent of its legitimate power
182 to uphold the devise and to effectuate the laudable and meritorious purpose of the testator" (*McCartee vs. Orphan Asylum So.*, 9 Cow., 437, 442). We think that both of these papers were intended by the parties thereto, at the time of their execution, as releases of claims in the ordinary sense of those words, and not in any sense as assignments or transfers (*Colton vs. Field*, 131 Ill., 398; *Cram vs. Sawyer*, 132 Ill., 443).

But, aside from these considerations, and upon the assumption that the releases operate as transfers, how does the matter stand? Messrs. Bulkley, Ritch and Vaughan were trustees in two capacities with reference to the same fund, one, however, subordinate to the other.

They were trustees, as we have seen, for the benefit of the ninth article colleges under the secret trust; and, owing to the statute of 1860, they were also trustees for the widow and next of kin, and the latter trust was paramount to the former. If, therefore, these gentlemen bought the rights of the widow and next of kin, for whose benefit did they take them? Not for their own, nor for the benefit of their donees, who stood in no better position, but for the benefit of the twenty colleges (*Torrey vs. Bank of Orleans*, 9 Paige, 649; *Fulton vs. Whitney*, 66 N. Y., 548). Under no circumstances is a trustee allowed to set up a title adverse to his *cestui que* 183 *trust* (Perry on Trusts, § 433; Lewin on Trusts, p. 285). The paramount trust having been bought in by the trustees, the other trust then became effective. Unless this position is true, a trustee may purchase outstanding titles against his trust estate, for his own benefit, and to the injury of the *cestui qui trust*, and thus speculate with the subject of his trust.

We are of the opinion, therefore, that, whether the residuary legatees, by the releases, extinguished or acquired the rights of the widow and next of kin, the result is the same. Upon either theory the widow and nieces had placed themselves in such a position, by their instruments of release, perhaps, without foreseeing all the consequences, that they could not demand of the residuary 184 legatees, as trustees, their equitable rights, and, therefore, the statute of 1860 at once ceased to apply (*Harbeck vs. Pupin*, 145 N. Y., 70, 77). It became as inoperative as if the widow had died before the testator. All persons for whose benefit the statute was passed having waived their rights, the result was the same as if it had never had an existence. The donees under the deed of gift had no greater rights than they would have had if there had been no widow to set the statute in motion. As the statutory claim of the widow and next of kin was all that could lawfully prevent the execution of the secret trust, when they voluntarily abandoned that claim, it became the duty of the residuary legatees, as trustees, to

carry out the testator's instructions in accordance with the promise made to him. Whatever interest they acquired by virtue of the releases inured to the benefit of the respondents, who thus stand before the Court entitled to the funds in controversy, unless they are estopped in equity, by their conduct, or at law, by a judgment, from asserting the claim presented.

5. The claim that there is an equitable estoppel rests upon the allegation that the respondents kept silent concerning their intentions while promoting and aiding the settlement with the widow and next of kin. So far
185 as this depends upon a question of fact, the final decision has already passed,against the appellants by the united action of the courts below. The ninth article colleges had no connection with the making of the deed of gift or the instruments of March 5, 1891. After these agreements of settlement had been executed the consent of the colleges was asked, not to the settlement, but to postpone the payment of their specific legacies "to the payment of the amount" that the widow and next of kin had agreed to accept. This is all they were asked to consent to and all that that they did consent to, as a careful reading of the instrument signed by them will show. They did not abandon any claim that they might make against the estate other than as thus specified. The effect
186 was simply that the respondents could not claim that the executors wrongfully paid out the $310,000, and we see no other element of estoppel against them arising from the facts. The claim of the residuary legatees that, owing to the instrument of "consent," they have paid a large proportion of the specific legacies to the twenty colleges, has no bearing, because they could not make a commercial use of the discretion confided to them by the ninth article of the will with reference to paying or withholding the specific legacies therein given. They were bound to exercise that discretion according to their honest judgment and not to make it the subject of barter. No payment was made to the respondents except such as it is

conceded they were entitled to receive. Moreover, it is unreasonable to believe that they were consenting to surrender and abandon $305,000, being the difference between $2,195,000. the aggregate amount of the specific legacies to colleges and hospitals, and $2,500,000, being one-half of the conceded value of the estate at the time of the testator's death. When the paper signed by them is considered in the light of such facts only as, according to the decisions of the courts below, they are presumed to have known at the time, we think that it should be construed as a consent to the payment of the money and not to the settlement as such.

187

6. The only point remaining that requires the expression of consideration is whether the adjudication by the Surrogate in proceedings under the Collateral Inheritance Act is a bar to this action.

An appraiser was appointed who, after giving notice to all parties interested, reported, among other things, that he was "not satisfied from the evidence submitted to report in favor of the claim that decedent's residuary property is charged with a trust in favor of Hamilton College and other corporations," and he, therefore, concluded that the property passed as provided by the will and codicils as proved. Upon this report an order was made by the Surrogate that the testator bequeathed the sum

188 of $717,398.69 to each of the three residuary legatees.

This was a special proceeding instituted by the Comptroller of the City and County of New York with the sole object of ascertaining what amount of property, passing under Mr. Fayerweather's will, was subject to taxation, and to fix the amount of the tax. The decree of the Surrogate should be construed solely with reference to that object and, as thus construed, the adjudication was that, for the purposes of taxation under the act in question, a certain amount of property passed to the residuary legatees under the will. Legitimate inquiry necessarily stopped at that point, for it was immaterial, so far as that

statute was concerned, whether the fund became impressed with a trust after it reached the residuary legatees, as the tax would be the same whether it did or not. They took the legal title, as we have held, and hence their legacy was subject to taxation without reference to what it became their duty to do with it. The adjudication was necessarily limited to the subject of taxation, and if conclusive at all as a bar, it was not conclusive upon the rights of the parties arising from matters outside of the will. The Surrogate was acting simply as an assessing and taxing officer, and represented the State for those purposes (*Matter of Wolf*, 137 N. Y., 205, 211). As
189 was said by this Court in *The Matter of Ullmann* (137 N. Y., 403, 407: "Every officer charged with the duty of executing the taxing power, whether it be a Surrogate or a town assessor, must necessarily decide, in a judicial capacity, important questions of law in order to perform the duties of his office. Ordinarily, such decisions do not, like judgments in actions, conclude the parties as to the same question in subsequent proceedings instituted for some other purpose, although in all such proceedings for the assessment of the tax it ought to, and, doubtless, would, until reversed and set aside." We think this foreshadowed the correct rule, and that the adjudication of the Surrogate was binding upon the question of taxation only.

190 We thus reach the final conclusion that all obstacles to the enforcement of the secret trust were lawfully removed, and that it is the duty of the Courts to give full effect to that trust in accordance with the intention of the testator and the promise of his residuary legatees. In announcing this result, which is the nearest approach to justice that we are able to make, it is a satisfaction to believe that the vast fortune involved will be distributed in accordance with the controlling thought and noble purpose of the man who made it.

The judgment should be affirmed, with costs to all parties appearing by separate attorneys payable out of the estate.

ANDREWS, *Ch. J.* (dissenting). I deem it proper to state the reasons for my dissent from the conclusion reached by the majority of the court.

The testator, by the ninth clause of his will, bequeathed to twenty colleges therein named legacies to a large amount, aggregating approximately a sum equal to one-half of his estate as it existed at the time of his death, on the 15th day of November, 1890. By the tenth clause he gave to his executors all the rest and residue of his estate in trust, to convert the same into money and to divide the same equally between the same twenty colleges named in the ninth clause. If the will had remained un-
191 changed it is clear that, under the statute of 1860 the gifts to the twenty colleges by the ninth and tenth clauses would have been ineffective and void so far as they exceeded one-half of the testator's estate. The testator left a wife surviving him, and the statute prohibits a devise or bequest by a testator having a husband, wife, child or parent, to any corporation of the classes therein enumerated, of more than one-half of his estate, and where such devise or bequest exceeding one-half the estate shall have been made, the statute declares that "such devise or bequest shall be valid to the extent of one-half and no more." The statute is aimed at and takes away the power of a testator in the respect mentioned. In *Chamberlain vs. Chamberlain* (43 N.
192 Y., 424), Judge Allen, referring to the statute of 1860, says: "The prohibition operates upon the testator's capacity to give, rather than upon the power of the legatee to take," and Rapallo, *J.*, in *Stephenson vs. Short* (92 N. Y., 433), referring to the cognate section in the Act of 1848, says: "The second (section) restricts the power of a testator to devise or bequeath to such corporation in certain cases, and prohibits a testator who leaves a wife, child or parent from devising or bequeathing to such corporation more than one-fourth of his estate." In the earlier case of *Bascom vs. Albertson* (34 N. Y., 584), the Court, referring to the Act of 1860, although the construction of the act was not then in question, said: "It

was designed to regulate and restrict the power of testators." There are other authorities in the State to the same purport, but it is unnecessary to cite them, because there can be no doubt upon the plain language of the statute that it was intended to limit the power of testators and invalidate any testamentary disposition to corporations mentioned in the act, in excess of one-half of testator's estate, but sustaining it up to that point. The language "shall be valid to the extent of one-half and no more," is too plain for argument or construction. I deem it important, in view of the interpretation placed on the codicils and the releases of the widow and next of
193 kin, to proceed somewhat further upon the assumption that the original will had remained unaltered, and to consider what would have been their rights if the testator had died without having changed the original will. I can entertain no doubt that in that event the portion of the estate beyond the one-half part, to which the twenty colleges would be entitled under the ninth and tenth clauses of the will, would, although given by the will to the twenty colleges, nevertheless go to the widow and next of kin, and descend and be distributable under the Statute of Descents or Distributions, as in the case of intestacy. No other conclusion is possible. The devise or bequest to the twenty colleges was invalid as to the excess, for so the statute declares. It could not go to
194 the residuary legatee, because they took it in trust for the corporations. The intention of the testator could not be enforced, because the disposition he attempted to make was illegal. The corporations could not stand upon the devise and bequest in their favor, because the statute which prohibited the gift necessarily precluded them from insisting upon the validity of the disposition. In all cases, upon the death of the owner of property, the title devolves upon some one, either under his will or upon his heirs or next of kin, or escheats to the State. If he undertakes by will to dispose of his property in a mode or for purposes which the law prohibits, the attempted disposition is void, and in the absence of any alternative

valid disposition by the will, it goes to his heirs and next of kin by operation of law. For no moment of time is the title suspended. In the case just supposed the rights of the heirs and next of kin attach immediately upon the death of the testator, and the will at most is a mere cloud upon their title. Their right would vest immediately without the intervention of any court, and an appeal to the court would be necessary only to put them in possession of their right in case it was denied or withheld. If any authority is needed to establish the proposition that a devise or bequest, made in contravention of the statute of 1860, is void, and that the part of the es-
195 tate devised to charity, in excess of the one-half part thereof, devolves upon the heirs and next of kin as in the case of intestacy, in the absence of any valid alternative disposition, the case of *Chamberlain vs. Chamberlain* is decisive. There the residuary estate, comprisiug more than one-half of the testator's estate, was devised and bequeathed, after the enactment of the statute, to two corporations within the act, and it was adjudged by the judgment, entered in the Supreme Court and in this court, that the gift, in excess of the one-half part of the estate given by the will to the two corporations, devolved upon the heirs and next of kin. The testator when he made the will was under no misconception as to the invalidity of the will under the Act of 1860, so far as it
196 gave to the twenty colleges more than one-half of his estate, nor as to the resulting rights of his heirs and next of kin. He was fully apprised by counsel of the restriction in the law of 1860, and in the memorandum which he delivered with the will to one of his executors, he recognized that his purpose to give the bulk of his estate to the twenty colleges could not be effectual, except through the forbearance and acquiesence of his heirs after his death. But after the execution of his will he came to appreciate the danger that his purpose might be defeated by the refusal of his heirs to consent to forego their rights or to waive any objection under the statute of 1860. This led to the execution of the codicil by which he revoked

the tenth clause of his will, substituting therefor a new residuary clause whereby he constituted Bulkley, Ritch and Vaughan his residuary legatees, and devised and bequeathed to "them and their heirs forever" his whole residuary estate, in form and absolute gift, subject on its face to no trust or condition whatever. It is out of the secret understanding found to have existed between the testator and the residuary legatees in respect to the disposition to be made of the residue that one of the most important questions in the case arises. It was found by the trial court that Bulkley, Ritch and Vaughan were made residuary legatees under the codicil by reason
197 of the promise of Ritch and Vaughan, made to the testator, for themselves, and on the part of Bulkley, that they would sell and convert the residuary estate into money and divide the same equally, share and share alike, among the twenty colleges mentioned in the ninth clause of the will. That this was the general purpose of Fayerweather in making this disposition is rendered clear by the memorandum of December 11, 1884, deposited with Ritch, in which the testator declares that he had made Messrs. Ritch and Bulkley his residuary legatees, "in the confidence that thereby my intentions *as expressed in my will* shall be carried into effect." By a codicil subsequent to the date of this memorandum Vaughan was joined as legatee with Bulkley and Ritch.

198 I assume that the finding of the trial court, heretofore stated, is supported by evidence. The judgment in this case awards to the twenty colleges named in the ninth clause of the will the whole of the residuary estate remaining in the hands of Bulkley, Ritch and Vaughan, who were executors of the will as residuary legatees. Independently of other grounds urged in support of the judgment, it is claimed that the promise of the residuary legatees, which was the inducement operating upon the mind of the testator to make the residuary gift, is enforceable in a court of equity as an equitable obligation binding in conscience, and which the legatees were bound to perform. The law, it is insisted, raises out of the

transaction a trust in favor of the real objects of the testator's bounty, which a court of equity proceeding upon its established principles will compel the legatees to observe and perform. If the correctness of the judgment below turned upon the question who were the parties intended by the testator to be benefited, and what colleges or institutions he intended should receive the residuary fund, I should have little hesitation in reaching the conclusion that they were the twenty colleges mentioned in the ninth clause of the will, and that a distribution made under the so-called deed of gift, or a devolution of the residue upon his heirs or next of kin, would disap-
199 point his expectations in making the codicil. But this is to be said of every case where the disposition made by a will fails from some inherent defect in the disposition itself. "It is not sufficient," says the Chancellor in *Haxton vs. Corse*, (2 Barb, Ch., 521), "to deprive an heir at law or distribute of what comes to him by operation of law, as property not effectually disposed of by will, that the testator should have signified his intention by his will, that his heir or distributee should not inherit any part of his estate. But to deprive an heir or distributee of his share of the property which the law gives him, in case of intestacy, the testator must make a valid and effectual disposition thereof to some other person." The cases are numerous in which courts of
200 equity have fastened constructive trusts upon the legal title to real or personal property in the hands of nominal owners in favor of persons to whom the owner owes an equitable duty in respect of the property in his hands, inconsistent with his retention of an absolute title. The foundation of this jurisdiction is in every case the incapacity of courts of law to give any or to give adequate relief, and from its very nature can never be invoked except for the promotion of justice and the prevention of fraud. The trust may be raised from circumstances, but for these purposes and for no others. It would be a solecism for a court of equity to imply an equitable obligation to do that which its own principles condemn, or to en-

force an express trust in contravention of the law. The beneficent jurisdiction of courts of equity to raise and enforce constructive trusts has no more signal illustration than in cases of devises or bequests procured to be made, absolute in form, upon the promise of the devisee or legatee to maks some provision out of the property devised or bequeathed for some other person or object, or to appropriate it in a particular way, and where it may be gathered that, except for the promise, the devise or bequest would not have been made. In such a case, the courts enforce the promise to prevent a double fraud upon the testator and a fraud upon the person for whose benefit
201 the promise was made. It is unnecessary to cits the cases which support this equitable principle. The subject is treated at length in the very able opinion of Judge Finch in the case of *O'Hara vs. Dudley* (95 N. Y., 403), and no other authority need be cited. But the principle, however broadly stated, must, from the nature of the case and the constitution of the Court called upon to apply it, be always subject to the limitation that the promise must be to do a lawful and not an unlawful thing.

The purpose to which the devisee or legatee undertakes to apply the money must be lawful, and although the purpose may be lawful, the promise may be illegal by reason of some prohibition of law disabling the testa-
202 tor from making a posthumous gift to the beneficiary under the circumstances or in the mode adopted. In either case, I conceive a court of equity cannot and will not imply a trust against the devisee or legatee for the purpose of enforcing the promise. The case of *O'Hara vs. Dudley* is a direct authority on the first proposition in the preceding paragraph, and the case under the Act 9, Geo. II., Chap. 36, improperly called a Mortmain act, cited in Judge Finch's opinion, sustains, I think, the second proposition. In the case of *O'Hara vs. Dudley* and in the English cases under the Act of George. II., the Courts refused to sustain a trust for the purpose intended by the parties, but adjudged that there was a re-

sulting trust in favor of the heirs and next of kin of the testator in the property held by the devisee or legatee under a gift absolute in form.

I have no doubt that under the facts found a court of equity, proceeding according to its settled principles, would raise a constructive trust as against the residuary legatee in favor of the twenty colleges. But this, subject to the necessary limitation that the trust so constituted was lawful. If it was unlawful under the Act of 1860, and if performance would violate that statute, then clearly a court of equity would not raise a trust in order to give effect to the proposed illegal disposition. I
203 am of opinion that the arrangement between the testator and the residuary legatee was in contravention of that statute. It is not denied that if the constructive trust sought to be raised in favor of the twenty colleges had been written out on the face of the will, the trust would be void under the statute. The statute prohibits a devise or bequest contrary to its provisions, "in trust or otherwise," a prohibition of the broadest and most sweeping character. But the claim is that the twenty colleges to whom the residuary estate has been awarded do not take under the will or under any devise in the will, or through any testamentary act, but outside of and independent of the will, through and by virtue of the conscientious obligation created by transactions *dehors*
204 the will, and that the case is not, therefore, within the statute. The same result concededly is attained as though the trust was written in the will, but this it is claimed is no objection to its enforcement, because a trust outside of the will arising by construction is not prohibited, and although the scheme adopted by the testator and assented to by the residuary legatees was for the purpose of evading the law, an evasion of a statute is not, or may not be a violation of the statute evaded.

I do not adopt the radical view of one of the learned counsel for the appellants, that a court of equity will not raise a constructive trust in favor of the twenty colleges, and will not lend its aid to enforce a transaction in eva-

sion of the Statute of 1860, although the transaction is not prohibited thereby. The residuary legatees concededly upon the facts found are not entitled to retain the property for their own benefit, and the heirs and next of kin have no title if it was legally disposed of by the will, and the secret trust was not illegal. It would not be unconscientious for the Court to award the fund to the institutions for whose benefit it was really given, on the mere ground that the testator intended to circumvent the law, provided the method he adopted was not a violation of the statute, although it tended to thwart its general policy. But, as I have intimated, the arrangement be-
205 tween the testator and the residuary legatee was prohibited by the Statute of 1860. That statute was not prompted by any hostility to charities or to religious or educational institutions. It did not restrict gifts *inter vivos* to the corporations mentioned, however large, even to the whole of the donor's property, and the only restriction upon which such gifts would arise out of the incapacity of the donee to take under its charter. What the statute plainly did intend was to prohibit one form of donation to corporations described in the act, which should exceed one-half of the donor's estate, namely, a donation by will. The donor was not permitted by will to give to the charities mentioned beyond the prescribed amount. The statute regulated and restricted testamentary do-
206 nations, and no others. It is to be observed also that all corporations are not included. The testator might have given by will all his property to corporations not of the class enumerated, and their capacity to take would be the only question. Nor is a testator prohibited from giving all his property by will to the corporations mentioned in the act, when he leaves no wife, children or parent surviving. The corporations enumerated in the statute were those to which, in the last days of life, a man, acting under mistaken notions of duty, might voluntarily or through persuasion be induced to give his property in disrsgard of the just claims of kindred. The felicitous language of Comstock, Ch. J., in *Downing vs. Marshall*, (23

N. Y., 366), frequently quoted, used in considering the general policy of the restriction upon devises to corporations contained in the general statute, is peculiarly applicable here. Speaking of the policy and necessity of the restriction in the Revised Statutes, he says: "Nor is this necessity by any means a fanciful one. It is eminently praiseworthy to give in the interest of charity and religion. But in the last hours of life exaggerated impressions of charitable and religious duty often obscure the judgments of men, and subject them to undue influence and persuasion. Against these the statute is intended to guard, because it is in behalf of associations incorpo-
207 rated for pious and benevolent purposes, that the sentiments of men in such situations are most generally appealed to. The enactment is, therefore, prohibitory, and it ought to be expounded and applied in that sense."

The English Statute of Geo. II., before referred to, although more radical than the statute of 1860, is founded on the same policy. It prohibits all devises of lands, or of funds, to be laid out in lands, to charities, but it does not prevent the owner of property. in his lifetime, to convey to charities all his property by deed, affixing only the restriction that it shall have been executed twelve months before his death and enrolled at least six
208 months prior to that event, restrictions intended manifestly to prevent even this method of gift when made in prospect of or under the shadow of impending death, The Court is asked to hold in this case that a scheme contrived by the testator and his residuary legatees for the purpose of circumventing the statute of 1860, and to make a posthumous gift of a very large estate to corporations, to whom the testator could not give it directly by will, through the device of a constructive trust, is not in contravention of the statute of 1860. I cannot assent to this proposition. It has, in my judgment, neither reason nor authority in its favor. The language of Lord Eldon, in *Strickland vs. Albridge* (9 Ves., 516),

is applicable to this case. "It would," he said, "be a strong proposition that the providence of the Legislature, having attempted expressly to prevent a disposition of land for purposes of this sort, was so short as to be baffled by such a transaction as is stated by this bill." The attempt here is to separate the strictly testamentary act from the secret arrangement, and to refer the right of the twenty colleges exclusively to the latter. But the will is a necessary and indispensable element in establishing the alleged trust. The testamentary gift and the secret arrangement are inseparably conjoined. The plaintiffs cannot proceed a step without showing the will and the
209 testamentary gift. It is only by attaching to this the promise of the residuary legatees that it can be pretended that any trust in their favor arises. The Statute of Wills, which requires wills to be in writing, was an obstacle to be overcome when originally the attempt was made to establish a parol trust in contradiction of the testamentary instrument. But the Court solved the difficulty by treating the two transactions as separate. The will, it was said, was not changed, but the right might be grafted on to the parol promise, and so technically the devise was not changed. But this subtle distinction was sustained for the purpose of preventing fraud and never to overreach or subvert the law. In numerous cases under the statute of George II., the
210 English courts have held that a secret trust for charity, engrafted on a devise absolute in form, was void. It is said that these cases are sustainable on the broad words of the statute. But the English statute is, I think, no broader than the statute of 1860. This statute prohibits all bequests or devises to corporations named therein beyond the permitted amount, "in trust or otherwise," that is, as I construe it, "in trust for the corporation or in any other manner," and it would, I think, be a narrow and misleading view to hold that it does not prohibit the device resorted to in the case before us.

If I am right up to this point, it necessarily follows that immediately on the death of the testator, a resulting

trust in the residue of the estate sprang into existence in favor of the widow and next of kin, which the Court would transform into a legal estate by compelling a transfer by the residuary legatees to them of the legal title. They could not under the findings retain the property for their own benefit; the twenty colleges could not enforce the illegal trust attempted to be created in their favor, and the only other alternative was a resulting trust in favor of the widow and next of kin. This trust *eo instanti* on the death of the testator displaced the unlawful trust attempted to be created in favor of the twenty colleges.

It was, therefore, essential to support a claim by the
211 twenty colleges to the fund that they should be able to show a right thereto derived from the widow and next of kin. They were the equitable beneficial owners, and their interest under well-settled rules prevailing in this State was assignable. They, as owners, could transfer their rights and interests to the twenty colleges, or to any other persons or corporations by an act *inter vivos*. It would be a transfer of their own property, not within the Act of 1860. But it would not be enough to establish the title of the twenty colleges for them to show that the widow and next of kin had divested themselves of their interest. It must appear that it had been acquired by the twenty colleges, or that an assignment was made to some other person or persons, which by the terms of
212 the assignment or by operation of law inured to their benefit. I repeat, the attempted trust in favor of the twenty colleges being void, and the resulting trust in favor of the widow and next of kin attaching to the fund, no title thereto can be asserted by any person or corporation, except a title derived from or under the widow and next of kin. The learned counsel for the twenty colleges, appreciating the stress of this view, seeks to sustain their title by the claim that the residuary fund was vested in them by force of the instruments called releases executed by the widow and next of kin, bearing date March 5, 1891, and June 12, 1891. These instruments it is insisted extinguished all claim of the widow and next of kin in

the fund now in question, and their claim being out of the way, the residuary legatees held the fund subject to the original trust, freed from any infirmity, by reason of the Act of 1860. The construction sought to be placed on the instruments of release by the learned counsel for the twenty colleges, namely, that they operated merely as a surrender to the residuary legatees and an extinguishment of the rights and claims of the widow and next of kin to the residuary estate, is, in my judgment, wholly inadmissible. This construction ignores the evident intention of the parties to the instruments, and contradicts their plain language and meaning, when read in the
213 light of the surrounding circumstances. The so-called deed of gift to the twenty or more colleges and institutions, executed by the residuary legatees February 24, 1891, purported to give the residuary fund to the beneficiaries therein named, with a reservation to Bulkley, Ritch and Vaughan of the right out of the fund to make additional provision for the widow and next of kin beyond that contained in the will. On the 5th of March, 1891, while the contest as to the probate of the codicils was pending, two instruments were executed, one by Bulkley, Ritch and Vaughan to the widow and next of kin, which referred to the deed of gift of the 24th day of February, 1891, and the reservation therein, whereby they added to the annuity to the widow the sum of
214 $10,000 beyond that given her by the will, and gave to the widow and next of kin, out of the residuary estate, further sums aggregating $310,000. The other instrument was the so-called first deed of release, in which the widow and next of kin, "in consideration of the instrument of even date herewith" (above referred to), bound themselves to make no claim upon Messrs. Bulkley, Ritch and Vaughan other than for the "amounts left us by the will and codicils, and the deed of gift executed by the said Bulkley, Ritch and Vaughan on the 24th day of February, 1891, and the instrument dated on the 5th day of March, 1891," and they further bound themselves upon payment to them respectively of the sev-

eral amounts mentioned in "said deed of gift and said instruments, to severally execute a general release of all claims, except those arising under the will and codicils, both to the executors aud to the donees mentioned in the deed of gift dated on the 24th day of February, 1891, and the said Bulkley, Ritch and Vaughan individually."

On the 12th day of June, 1891, the widow and next of kin severally executed the formal deeds of release provided for in their deed of March 5, 1891. The release of Mrs. Fayerweather first acknowledges the receipt of the two hundred and twenty-five thousand dollars, to
215 which she was entitled under the instrument executed by Bulkley, Ritch and Vaughan March 5, 1891. The language is: "For and in consideration of the sum of two hundred and twenty-five thousand dollars, lawful money of the United States, to me in hand paid by Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, as executors and trustees under the last will and testament of Daniel B. Fayerweather, deceased, and individually and as the representatives of the persons and corporations hereinafter named, forming a class known as donees under the deed of gift executed by the said Bulkley, Ritch and Vaughan on February 24, 1891." She next acknowledges that sum to be "in compromise and full settlement of any and all contests on my part of the
216 will of said Daniel B. Fayerweather, deceased, or concerning his estate." Following the statement of the consideration and that the sum received was in full compromise and settlement, are the operative words of the instrument, namely: "Have remised, released and forever discharged, and by these presents do for myself and for my heirs, administrators and executors, remise, release and forever discharge the said Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, as executors and trustees aforesaid, as individuals and as representatives of the said donees constituting a class, and also the said donees, to wit, the persons and corporations mentioned in a certain deed of gift duly delivered, made by

Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan on the 24th day of February, 1891, which deed of gift was introduced in evidence in the probate proceedings of the last will and testament of Daniel B. Fayerweather, deceased (and marked Exhibit No. 7, contestants), and which said deed of gift is hereby made a part of this release, in order that the persons constituting said class of donees, and to whom this release runs, may be more fully known, and also the legal successors, assigns, heirs, executors and administrators of all the aforesaid persons and corporations, *of and from* all and all manner of action and actions, cause and causes of action,
217 suits, debts, dues, sums of money, claims and demands whatsoever, in law or in equity," etc., concluding by an exception of her claim for the annuity mentioned in the agreement of March 5, 1891, "made pursuant to the deed of gift above referred to." The releases by the next of kin were of the same purport.

It seems impossible to read these releases in view of the circumstances which led to their execution, without being forced to the conclusion that they were executed with the intention and for the sole purpose of giving effect to and confirming the deed of gift of February 24, 1891. They acknowledge the receipt of the consideration from Bulkley, Ritch and Vaughan, as representatives of the donees under the deed of gift. They "remise and release"
218 to the donees under the deed of gift, and to Messrs. Bulkley, Ritch and Vaughan, "as representatives of said donees." They annex the deed of gift to the release in order that the persons "to whom the release runs" may be identified. This transaction, if it has any meaning, was to make good the deed of gift, which, without the confirmation of the widow and next of kin, would be ineffectual, and give no title to the donees. The absence of specific words of transfer or sale is of little moment if the intention is plain. The intention is the cardinal fact in the construction of written instruments. Where the words permit an instrument to operate in either of two ways it is effective for the way at which the intention

points, when that can be ascertained by reading the instrument in the light of the surrounding facts. In former times certain technical words were essential in deeds of realty. Here the property was mainly personal, and in respect to the creation of interest in personal property formal words are not important, if the substance of the transaction intended can be ascertained. Unless the releases operate as confirmation of the deed of gift it has no operation whatever as to the donees, "to whom this release runs." The release, for greater precaution, extended to the executors in their official character, and to them as
individuals, but this accentuates the fact that the
219 paramount purpose was to ratify and confirm the
deed of gift. And, finally, on this point, whatever may be said as to the release operating as a transfer to the donees in the deed of gift, there can be no pretense that the widow and next of kin intended to transfer their interest in the estate to the twenty colleges. They are not in any way referred to in the written instruments, and it is difficult to perceive how a transaction can inure to their benefit contrary to the intention of the parties, and which would give it the practical effect of rehabilitating the illegal trust.

It is said that the Statute of 1860 was intended for the benefit of a wife, husband, child or parent, and that, if
they do not raise the question, the validity of a will
220 under the statute cannot be questioned by other par-
ties. In my view that inquiry is not pertinent under the facts in this case. The widow has raised the question in the most emphatic way by transferring her interest in the estate to the donees under the deed of gift. But I am of opinion that any person who would take an interest in the property of a decedent, under the Statutes of Descent or Distribution, in case of intestacy, may raise the question under the Statute of 1860, although not holding the relationship mentioned in the statute, provided he would be entitled, if the statute had been violated, to a share in the excess willed to the corporations, and that he would not be bound by the consent of other parties to the dispo-

sition. The case of *Harris vs. American Bible Society* (2 Abb. Ct. App. Dec., 316), and *Chamberlain vs. Chamberlain* (43 N. Y., 434), seem to be direct authorities upon this point. In both the testator left a widow, and no child or parent, and bequeathed more than half his property to corporations by wills taking effect after the passage of the Act of 1860. In the one case the widow consented to the invalid disposition, and in the other, by her election to take a provision in lieu of dower, she was held to be barred from claiming any other interest. In both cases the objection interposed by next of kin, remote relations of the testator, was sustained.

221 There are other points argued by the counsel for the appellants which are not free from difficulty, but I will not consider them. I think the judgments below are erroneous, and that the donees under the deed of gift are entitled to the fund.

All concur with Vann, *J.*., for affirmance, except Andrews, *Ch. J.*, who reads for reversal.

Judgment affirmed.

222

COURT OF APPEALS.

THE TRUSTEES OF AMHERST COLLEGE, *et al.*,

Respondents,

223 *against*

THOMAS G. RITCH, *et al.*, as Executors, Etc., *et al.*,

Appellants.

Exhibit No. 9.

Motion Papers in the New York Court of Appeals Upon the Application to Amend the Remittitur.

Upon the annexed affidavit of William Blaikie, verified January 27, 1897, and upon all the proceedings herein:

"Let the parties to this action, or their attorneys, show cause before this Court, at the Capitol in Albany, New York, upon the first day of March, 1897, at ten o'clock A. M., or as soon thereafter as counsel can be heard,
224 why the remittitur of this Court herein should not be so amended as to direct the Justice of the Supreme Court before whom this action was tried at Special Term to consider the evidence given before him at said trial concerning the agreements to release, and the releases, made by Lucy Fayerweather, the widow of Daniel B. Fayerweather, deceased, and Mary W. Achter and Emma S. Fayerweather, his nieces, and of his next of kin; the law bearing upon said evidence, agreements and releases; the questions of law and fact propounded by the several counsel herein for and against the validity of said agreements and releases; and to pass upon the same; and to determine if said agreements and releases are valid and binding; or if they are invalid and void; and why such

other relief should not be had in the premises as should be equitable and just."

And meanwhile, and until two days after service of a copy of the order made by this Court upon the determination of this motion, let all proceedings upon the part of the respondents herein, and of each of them; of their attorneys and of each of them and of the Clerk of this Court; of the Supreme Court of the State of New York for the First Judicial Department; and of the Clerk of the City and County of New York, be and the same are, hereby stayed.

And let service of a copy of this order upon the par-
225 ties to this action or their attorneys; upon the Clerk of this Court, and upon the Clerk of the City and County of New York, on or before January 30th, 1897, suffice.

Dated at Albany, N. Y., January 28, 1897.

(Signed)
J. C. GRAY,
Assoc. Judge Ct. of Appeals.

226

COURT OF APPEALS.

THE TRUSTEES OF AMHERST COLLEGE *et al.*,

Respondents,

227 *against*

THOMAS G. RITCH *et al.*, as Executors, etc., *et al.*,

Appellants.

City and County of Albany, ss.:

William Blaikie, attorney for John B. Reynolds, sole executor of the last will and codicil of Lucy Eayerweather, deceased; of Mary W. Achterand Emma S. Fayerweather, appellants herein, being duly sworn, says:

228

This action, to determine upon what trust the residuary estate of Daniel B. Fayerweather was devised and bequeathed; and who owns said residue; was tried before Mr. Justice Truax, at a Special Term of the Supreme Court, held in the City of New York; decision was rendered by him; and judgment was entered thereon in the office of the Clerk of said Court on or about December 28, 1894, adjudging that the executors of said testator's last will and codicils hold said residue in trust for the respondents herein.

Although at said trial voluminous testimony, oral and documentary, was presented to said Justice concerning

said agreements and releases executed by said widow and next of kin of their interest in said residue, and the circumstances under which they were procured, and the law bearing thereon was discussed by many counsel orally and by brief:

There is no reference to said agreements and releases in any finding; or in said decision and judgment; nor did said Court render any determination or judgment as to said agreements and releases; or as to either of them;

Nor does any determination or judgment of said Special Term concerning them appear anywhere herein.

On the contrary, in his opinion, filed at about the
229 time of said decision was handed down, Mr. Justice Traux expressly states (fol. 4216), that

"The view that I have taken of the facts and the law of this case renders it unnecessary for me to consider the very interesting questions of law propounded by the learned counsel for the defendants, Reynold, Achter and Fayerweather." * * *

An appeal to the General Term was taken from said judgment by the executors; by the donees of the deed of gift, and by the widow and said next of kin.

The General Term affirmed said judgment, and an
230 order of affirmance was entered on or about December 18, 1895.

Appeal was taken from said order to this Court.

Argument was heard thereon December 1 and 2, 1896; January 19, 1897, judgment was rendered affirming the decision of the General Term.

The General Term dealt with said agreements and releases, and held, as follows, in their opinion by Follett, *J.* (fol. 4449):

"It is urged that these releases were procured by fraud and undue influences. There is no evidence in the record justifying this contention."

The only Court that has had an opportunity to see the witnesses face to face;

To test their opportunity for knowing the truth;

Their capacity to tell it;

Their disposition to tell it;

Their credibility;

To weigh the evidence fairly and thoroughly;

To determine how it preponderated;

And then to apply the law thereto;

Thus, expressly avows that it intentionally declined to deal with the questions of law applicable to the facts connected with said agreements and releases;

231 And impliedly avows that it declined to consider those facts themselves;

And so to determine the rights of said widow and kin in and to said residue; the Special Term states the reason for such omission to be in substance, that, as the attempt to carry the residue to the respondent did not appear upon the face of any testamentary paper, it did nôt come within Chapter 360 of the N. Y. Laws of 1860; but the General Term held that it did come within that statute;

And this Court deals with this question in its opinion herein by Vann, *J.*, thus:

"The argument is not without force when applied to a trust that does not run foul of a statute. When,
232 however, as in this case, the trust is a manifest evasion of a statute, sound public policy forbids that the testator should be permitted to effect indirectly that which he could not effect directly; at least until all intervening rights derived from the statute had been lawfully cleared away. We think that the Act of 1860 applies."

Again: "Messrs. Bulkley. Ritch and Vaughan were trustees in two capacities with reference to the same fund, one, however, subordinate to the other. They were trustees, as we have seen, for the benefit of the Ninth Article Colleges under the second trust, and, owing to the Statute of 1860, they were also trustees for the widow

and next of kin, and the latter trust was paramount to the former."

The Chief Judge also says: "They could not, under the findings, retain the property for their own benefit; the twenty colleges could not enforce the illegal trust attempted to be created in their favor, and the only other alternative was a resulting trust in favor of the widow and next of kin. This trust *eo instanti*, on the death of the testator, displaced the unlawful trust attempted to be created in favor of the twenty colleges. It was, therefore, essential to support a claim by the twenty colleges to
233 the fund that they should be able to show a right thereto derived from the widow and next of kin. They were the equitable beneficial owners, and their interest, under well settled rules prevailing in this State, was assignable. They, as owners, could transfer their rights and interests to the twenty colleges, or to any other persons or incorporations *inter vivos*. It would be a transfer of their own property.

This Court thus holds that the law of 1860 does apply; it also holds that the widow and kin owned substantially the whole residue, but have released it;

And that "the final decision has already passed against the appellants by the united action of the courts below."

234

It also holds that "we are of the opinion, therefore, that where the decision of the Special Term does not state the facts found, and the judgment entered thereon has been affirmed by the General Term upon an appeal to this Court, all the facts alleged in the complaint, warranted by the evidence, and necessary to support the judgments below, are PRESUMED to have been found. Hence, upon such an appeal, we have no more control over the facts than we have when specific findings are made by the Special Term and affirmed by the General Term. This conclusion takes the question as to the fraud alleged to have been practiced by the residuary legatees upon the widow and next of kin in procuring the releases

out of the case; for it cannot be said on the record before us that the evidence tending to show fraud is so irresistible as to make the omission to find fraud an error of law. Assuming that there was evidence enough to warrant the inference of fraud, there was also ample evidence to warrant the inference that there was no fraud. A question of fact was thus presented which is beyond our power of review.

By thus not according to the widow and kin the hearing and judgment provided by law, they have been, wholly without their consent, deprived of a trial of the fundamental question upon which their rights to a
235 great estate depend;

Of the judicial proceedings, appropriate and customary, in such a case;

Of a "judicial trial," as laid down by this Court by Comstock, *Ch. J.*, in 13 N. Y., page 393;

Of recourse to the "law in its regular administration" as laid down by this Court by Chancellor Kent, cited in said case;

Of a trial according to those rules and forms which have been established for the protection of private rights as laid down by thie Court by Edwards, *J.*, in 12 N. Y., page 209;

Of a trial according to the forms and solemnities for determining the title to property as laid down by
236 Jewett, *J.*, by this Court in 10 N. Y., page 397;

Of the "notice, hearing and judgment," to which this Court, by Andrews, *J.*, says that they are entitled in 74 N. Y., page 519.

Our notice of appeal herein was filed and served December 31, 1895, before the new Constitution went into effect.

I am informed and believe that up till two o'clock today no remittitur has been filed in the office of the Clerk of the Court below.

It appears from the record that although these ladies were the owners of two million five hundred thousand dollars, releases were obtained from them for

the grossly inedequate, inequitable and unjust consideration of about twelve per cent. of that sum.

That of the two trusts in question, all knowledge of the only one under which the executors admitted and claimed that they held was suppressed from these ladies; not only until said executors obtained said releases from them, but for nearly three whole years afterwards;

That the other trust rests upon a gift of the residue in the tenth clause of the will in 1884 and in the first codicil two months later, when the draughtsman Ritch swears that the residue was so small and uncertain that the testator did not know if it even existed;

237 That no other codicil materially affecting the residue was made till nearly six years later, in which time said residue had arisen to the colossal sum of several million dollars.

That as to the credibility of the only witness who claimed to know the contents of that codicil and to testify to them this Court says: "But there is a more radical answer to the claim that the secret trust was made indefinite by conversations with Mr. Vaughan, because the trial Court was not bound to believe, and from the record before us is presumed not to have believed, that the alleged conversations ever took place. Mr. Vaughan, although without mercenary interests, was an interested party, under the temptation to so testify as to relieve

238 himself of the obligation to comply with the secret trust and to justify his action in executing the deed of gift. He rested under the imputation of selfishly raising suspicions in the mind of the testator of Mr. Ritch until he was himself made one of the legatees, when he suddenly became satisfied with Mr. Ritch's honesty, and proclaimed that he was "all right." He was not entirely candid, neither with Mr. Ritch or Mr. Fayerweather. He told Mr. Ritch, on an important occasion, that the testator was too ill to be seen, when that served his own purpose, although he himself saw him almost every day on business of the utmost moment, and he did not deliver Mr. Ritch's honorable and specific letter to Mr. Fayer-

weather, when he had impliedly undertaken to do so. He did not produce the envelope upon which the memorandum as to "more institutions for benefit" said to have been made, until a late day, nor did he swear, upon the trial before the Surrogate, to the conversation alleged to have been had with the testator during his last hours. He was contradicted by Miss Joyce, who denied in effect that that conversation took place, and his conduct toward that lady, when he shook his fist in her face and said that he would spend the entire estate, together with his own fortune, if necessary, to succeed in the litigation then pending, shows the deep interest that he took in the
239 will and the rights that he claimed under it. There was not such clearness of memory, frankness of disclosure or freedom from interest as to make his testimony conclusive. Under these circumstances the trial Court was not bound by Mr. Vaughan's testimony and the presumption is that the courts below rejected it so far as that presumption is necessary to sustain the judgments that they rendered."

It also appears that the $310,000 obtained by these ladies for their releases were, all the time, their own dollars.

And that the releases made over $2,000,000 wholly without any consideration; in other words, by a
240 *nudum pactum*.

It also appears that the widow had the choice between taking ten per cent. of what belonged to her and forfeiting the other eighty-eight per cent. wholly without right, or awaiting the result of a litigation, which would evidently outlast her in her then enfeebled condition and advanced age.

And that the trial Justice has not dealt with this duress of her property.

The record is extraordinarily voluminous, consisting of 1,100 printed pages;

The amount at stake is enormous;

There are upwards of fifty parties, nearly all represented by separate counsel.

We desire to avoid multiplicity of suits, and not to take much of the time and labor of the Court in going over matters that, in about all respects but this vital one, have been dealt with.

The trial Justice is not only intimately familiar with the facts upon which the validity or invalidity of said releases rests;

But he has so disposed of the rest of the case that, aided by the briefs already submitted to him, covering the questions left uncovered, and by his great familiarity with the whole matter, the work of determining the validity or invalidity of said releases for him, is limited to a nar-
241 row compass.

The executor of the widow and the nieces believe that they have been "deprived" of their "property, without due process of law," in contravention of their rights and of the great safeguard guaranteed to them by the Constitution.

They respectfully ask that the remittitur be so amended as to direct the trial Justice to consider what he has frankly stated that he did not consider in connection with said agreement and releases;

That he pass upon the same;"

And for such other relief as may be equitable and just.

No previous application has been made for this order.

242 WILLIAM BLAIKIE.

Sworn to before me this 28th day of January, 1897.

(Signed) THOMAS F. BEHAN,
Notary Public,
Albany Co.,
N. Y.

[NOTARIAL SEAL.]

COURT OF APPEALS.

STATE OF NEW YORK.

THE TRUSTEES OF AMHERST COLLEGE and others,
Respondents,
243 *against*
THOMAS G. RITCH *et al.*, individually, and as Executors and Trustees of the Last Will and Codicils of Daniel B. Fayerweather, deceased, and others.
Appellants.

Please take notice that, upon the annexed affidavit of William Blaikie, verified February 17, 1897, and upon all the pleadings and proceedings herein, John B. Reynolds, as sole executor of the last will and codicil of
244 Lucy Fayerweather, deceased, Mary W. Achter and Emma S., Fayerweather, appellants herein, will move this Court, upon the hearing of and as part of the motion upon the return of the order to show cause, made herein January 28, 1897, and returnable March 1, 1897, at the Capitol at the City of Albany, New York, to so further modify the *remittitur* herein; if the Justice before whom this cause was partly tried, shall, for any reason be prevented from trying the further issues herein, as to direct the Special Term of the Supreme Court of the State of New York, for the First Judicial Department; or, if said Justice is not so prevented, then to direct him to consider the evidence that may be given at such trial

concerning the agreements to release, and the releases, of their several respective rights to and interests in the estate of said Daniel B. Fayerweather, deceased, made by his widow, Lucy Fayerweather, and by his nieces, Mary W. Achter and Emma S. Fayerweather, and of his next of kin; the law bearing upon said evidence, agreements and releases; the questions of fact and law that may be propounded by the several counsel herein for and against the validity of said agreement and releases; and pass and state judgment upon the same; to determine if said agreements and releases are valid and binding; or if they are invalid and void.

245 And, if this Court deems that entire justice cannot be done to all concerned without a rehearing, then that a rehearing and trial of the whole of said cause be ordered before said Justice, or said Special Term; and to further insert in said remittitur an intimation that, owing to the importance and magnitude of the interests involved, if said Justice or said Special Term should deem it advisable, in the interests of justice, and for the speedy determination of the matter, to avail himself or itself of the aid of a jury herein; and to submit to such jury the following questions, to wit:

First.—Whether the agreements to release and the releases of their respective rights to and interests in the
246 estate of Daniel B. Fayerweather, late of the City, County and State of New York, deceased, procured from his widow, Lucy Fayerweather, and from Mary W. Achter and Emma S. Fayerweather, his nieces and of next of kin, by Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, as his executors and trustees; and individually:

Were obtained fairly.
Or were obtained by fraud.

Second.—Whether said agreements and releases were obtained from said ladies by said Ritch, Bulkley and Vaughan for fair and adequate consideration;

Or for a consideration grossly unfair, inadequate and unjust.

Third.—Whether said Ritch, Bulkley and Vaughan got from said ladies about $2,000,000 worth of the latter's property for a good, valuable, substantial and just consideration;

Or for no consideration at all.

Fourth.—Whether said agreements and releases were the free and voluntary acts of said ladies; done with full knowledge of their rights in and to the estate of said
247 Daniel B. Fayerweather, deceased;

Or were obtained from them by said Ritch, Bulkley and Vaughan by oppressive conduct; by compulsion, and by duress of the property of said ladies.

Then that such submission of said questions to a jury for its verdict thereon would meet with the approval of this Court.

And for such other relief as may be meet, equitable and just.

Dated at New York City, February 17, 1897.

WILLIAM BLAIKIE,
Attorney for Sole Exr. of Lucy Fayerweather,
248 deceased; Mary W. Achter and Emma S. Fayerweather, Appellants.
206 Broadway, New York.

To Messrs. PUTNEY & BISHOP,
Attorneys for Plaintiffs-Respondents, Broadway, New York.

Messrs. ARNOUX, RITCH & WOODFORD,
For Defendants Thomas G. Ritch, individually and as Executor, Etc.; Cornell University, Marietta College and Elmira College, 18 Wall Street, New York.

Messrs. Parsons, Shepard & Ogden,
For Defendants Justus L. Bulkley and Henry B. Vaughan, individually and as Executors, Etc.; Maryville College and Wabash College, 111 Broadway, New York.

Messrs. G. G. & F. Reynolds,
For Defendant Wesleyan University, 16 Court Street, Brooklyn, N. Y.

Messrs. Redding & Kiddle,
For Defendant Northwestern University, 38 Park
259 Row, New York.

Messrs. Butler, Stillman & Hubbard,
For Defendants President and Trustees of Bowdoin College, 54 Wall Street, New York.

Messrs. Robinson, Biddle & Ward,
For Defendants The University of Pennsylvania and Haverford College, 160 Broadway, New York.

Messrs. Adams & Comstock,
For Defendant The Union Theological Seminary, 36 Wall Street, New York.

260 Messrs. Chanler, Maxwell & Phillip,
For Defendant The Trustees of Union College, 120 Broadway, New York.

Messrs. Joseph E. Gray,
For the Defendant The Eye and Ear Infirmary, 71 Wall Street, New York.

Mr. John R. MacArthur,
For Defendant The Shattuck School, 18 Wall Street, New York.

To Mr. JOHN M. PERRY,
For Defendants New York Cancer Hospital and the Peter Cooper Union, Etc., 55 William Street, New York.

Messrs. UNDERWOOD & STORKE,
For Defendant Wells College, 120 Genesee Street, Auburn, N. Y.

Mr. ROBERT E. TAYLOR,
For Defendant Vassar College, 275 Main Street, Poughkeepsie, N. Y.

261

Messrs. THORNTON, EARLE & KIENDL,
For Defendant Manhattan Dispensary, 108 Fulton Street, New York.

Messrs. HOPPIN & TALBOT,
For Defendants The Woman's Hospital, Etc., and Brown University, Etc., 111 Broadway, New York.

Messrs. JULIUS J. & A. LYONS,
For Defendant The Montefiore Home, 140 Nassau Street, New York.

262 Messrs. POWELL & KROPF,
For Defendant The Manhattan Eye and Ear Hospital, 120 Broadway, New York.

Messrs. LOCKWOOD & HILL,
For Defendant Trinity College, 115 Broadway, New York.

Mr. GEORGE S. INGRAHAM,
For Defendant The Methodist Episcopal Hospital, 44 Court Street, Brooklyn.

To Messrs. Bristow, Peet & Opdyke,
For Defendant The University of the City of New York, 20 Nassau Street, New York.

Messrs. De Forest Brothers,
For Defendant The Presbyterian Hospital, 62 William Street, New York.

Mr. Wager Swayne,
For Defendant Lafayette College, 120 Broadway, New York.

263 Mr. Haley Fiske,
For Defendants The Trustees of Rutger College, Etc., and the President and Fellows of Yale College, Etc., 1 Madison Avenue, New York.

Messrs. Hoadly, Lauterbach & Johnson,
For Defendant Mt. Sinai Hospital, 22 William Street, New York.

Mr. Clark Brooks,
For Defendant Park College, 54 William Street, New York.

Messrs. Alexander & Green,
264 For Defendant The Trustees of the College of New Jersey, Etc., 120 Broadway, New York.

Messrs. Evarts, Choate & Beaman,
For Defendants The President and Fellows of Harvard University, 52 Wall Street, New York.

Messrs. Miller & Briggs,
For Defendant The St. Vincent Hospital, 32 Nassau Street. New York.

Mr. J. McL. Nash,
For Defendants The Trustees of Columbia College, 67 Wall Street, New York.

To Mr. William Bard McVickar,
For Defendant St. Luke's Hospital, 67 Wall Street, New York.

Messrs. Hornblower, Byrne & Taylor,
For Defendant Lincoln University, 45 William Street, New York.

Mr. Robert C. Taylor,
For the Rector and Visitors of the University of Virginia, 253 Broadway, New York.

265 Messrs. Brownell & Lathrop,
For Barnard College, 71 Wall Street, New York.

Messrs. Scott & Upson,
For the Adelbert College of the Western Reserve University, 59 Wall Street, New York.

Mr. J. McGregor Smith,
For the Hampton Normal and Agricultural Institution, 32 Nassau Street, New York.

Mr. Byram L. Winters,
For Anner Amelia Reynolds, 206 Broadway, New
266 York.

COURT OF APPEALS.

STATE OF NEW YORK.

THE TRUSTEES OF AMHERST COLLEGE *et al.*,
Respondents,
267 *against*
THOMAS G. RITCH *et al.*, as Executors, Etc., *et al.*,
Appellants.

City and County of New York, ss.:

William Blaikie, attorney for John B. Reynolds, as sole executor of the last will and codicil of Lucy Fayerweather, deceased; for Mary W. Achter and for Emma S. Fayerweather, appellants herein, being duly sworn, says;

268 I am informed and believe as follows: That Mr. Justice Truax, before whom this cause was tried at Special Term of the Supreme Court of the State of New York in the year 1894, was not a Justice of said Supreme Court in 1895; but that in November, 1895, he was re-elected to, and now holds office as a Justice of said Supreme Court.

That it is the desire of my said clients that, if this Court awards a trial of the questions in this application, touching the validity or invalidity of the agreements and releases; of their rights to and interests in the estate of said testator, made by his said widow and next of kin;

Such trial shall, if practicable, be had before Mr. Justice Truax.

From the record herein it appears (fol. 3563) that in a prior will made by said Daniel B. Fayerweather, October 2, 1880, his said wife, Lucy Fayerweather, was named as an executrix thereof.

But that said Thomas G. Ritch was not named as executor thereof.

I am told and believe that said Ritch did not prepare said prior will.

The record (fol. 1123) says that he drew said testa-
269 tor's last will, to wit, that of October 6, 1884, and (fols. 1137, 1213, 1214) each of the four unburnt codicils thereto.

In said last will, so drawn by Ritch, said testator's wife was NOT named as an executrix; but said Ritch was substituted in her place.

Upon an estate worth about $6,000,000, nearly all of it being personal property, this substitution would entitle Ritch—if true to his trust—to a commission of about $60,000 00
and deprive Mrs. Fayerweather of that sum.

The first unburnt codicil gave the residue absolutely to Ritch and Bulkley.

No proof appears on the record that Bulk-
270 ley knew this.

The devises and bequests in said last will; and in the four, unburnt codicils; amounted to a little under.....$2,500,000
Of the residue of about $3,500,000 Ritch's half, as he wrote it, undisturbed, would now have been about.....$1,750,000

Bulkley did not know of the testator's letter to him and Ritch, saying that this residue was not their own.

For nearly six years Ritch seems to have had this letter up to the day of the testator's death (fols. 1141-2).

And in that time to have never shown it to any one, save once to the testator himself (fols. 1141-2) and Vaughan.

Had this letter been lost or destroyed:

The record shows no other written evidence save the fifth codicil, that this bequest to him of one-half of the residue was not absolute.

When told to draw the second unburnt codicil, over three years later, namely, January 8, 1888, and name Vaughan in it as an executor, he drew it, and put Vaughan in as an executor, but NOT as a residuary legatee.

271 His (Ritch's) own right to one-half of the residue thus remained undisturbed.

The third unburnt codicil was practically unimportant. Five days before he died, Mr. Fayerweather, who was then partly blind (fol. 1951), asked Vaughan to read to him his last will, and its first three, unburnt, codicils.

Upon doing so, Vaughan learned that Ritch would be absolute owner of one-half of a residue, that he, Vaughan, knew (fol. 3317) exceeded three million dollars; and that Bulkley would own the other half; and that he, Vaughan, had been left out. Though he says (fols. 3145-6) he does not recall if he denounced Ritch; what Mr. Fayerweather and he thought will be seen from the fact that the latter would not let him go to Ritch (fol. 3104), but that he
272 went at once to his own lawyer (fols. 3139, 334-37 inclusive), and had a fourth codicil drawn, under his own "engineering" (fol. 3422), and Mr. Fayerweather executed it four days before he died. All it did, that Vaughan said he could tell three months later, was that it dealt only with the residue (fols. 1999, 3181), but gave that to the twenty colleges equally (fol. 1999). But its witnesses, the two family physicians, say that, instead of its giving the vast residue to said colleges, Mr. Fayerweather, just before he signed it, interrupted the lawyer reading it, and said (fol. 3509): "Stop; do I understand this, that after ALL THESE LEGACIES are paid, and THESE

PARTIES SATISFIED, the property is divided among the institutions?"

So, giving but a part only of this residue to the twenty colleges, and NOT the whole of it (fol. 2000). But Vaughan, only three months later, said he did not remember this part.

It nowhere appears that Ritch was named as an executor of this fourth codicil.

Under the circumstances surrounding its execution, it is incredible that he was named as its executor.

Mr. Fayerweather never saw Ritch again.

Two day's later, by Vaughan's "engineering,"
273 he signed a letter Vaughan wrote to Ritch, demanding the original of his will, and first three codicils, for he only had a copy of them; Ritch had the originals (fol. 1181).

Ritch at first would not give them to Vaughan (fol. 2015).

In a letter Vaughan wrote that day, he said that Ritch grew as white as paper (fol. 2015).

This pallor did not prevent Vaughan's worming out of Ritch that there was a secret letter, which told him now for the first time that Ritch and Bulkley would not own the residue, but would take it on a secret trust (fol. 3440).

About eleven o'clock the next night, Saturday, No-
274 vember 15, 1890, Mr. Fayerweather died (fol. 1796).

That noon, without the testator knowing that he was going to do so, Vaughan "engineered" a fifth codicil (fol. 3422); had it drawn, not by his own lawyer, but this time by Ritch; again put Ritch and Bulkley in as absolute owners of now over three millions, but was careful to "engineer" in one other man, as equal owner with them (fol. 3258).

And that man was Vaughan himself (fol. 3605).

No mere co-executor this time; but co-owner of the residue (3605).

He brought two clerks from Ritch's office to witness it (fols. 1825, 3388); kept out of the dying man's room,

while it was being executed (fols. 3261, 3387), had in there only said two clerks, and an unsuspecting girl; none of the testator's family being there (fols. 2760–1, 2851).

Two hours later he asked Mr. Fayerweather if he wanted "this paper" destroyed; but did not say what the paper was (fols. 321, 2799); the gasping man, partly blind (fol. 1951), nodded; and Vaughan took a paper to a fire, not "in the presence of" the testator, as required by law; but to the range-fire in the kitchen in the basement, two stories below; and caused it to be burned (fol. 3210). No one but Vaughan tells what this paper was.

275 He thus brought himself within the rule laid down by this Court in *Tyler vs. Gardner*, 35 N. Y., 592 (middle,) as follows, to wit:

"When the principal beneficiary under a will, prepared for execution by a party worn down by disease, and close upon the verge of death, assumes the responsibility of initiating" (engineering) "it; of preparing formal instructions; of employing the draughtsman; of selecting the witnesses; of being present at every stage of the proceedings; and of excluding those to whose inheritance a new direction is given, it behooves such beneficiary to be provided with evidence that the instrument expresses the honest and spontaneous purposes of the person who is
276 called upon at such a time, to reverse the provisions of a previous testamentary disposition, made in health and strength, in favor of those having clear claims upon the justice and bounty of the testator."

After thus destroying the fourth or last codicil (if that was really what he destroyed), made while the testator was fit to make it, he returned to the dying man's bedside. When Mr. Fayerweather saw him he peremptorily ordered him out of the room (fols. 2794–5).

Vaughan later asserted that said burnt paper was the codicil made November 11, 1890, four days before the death, which, he says, gave all the residue to the twenty

colleges, but which the two doctors both say gave only part of said residue to said twenty colleges (fol. 3509).

Soon after the death, when the widow and next of kin came to him—the testator's confidential friend and executor, familiar with all that was done—to know what they had inherited;

And how this enormous residue came to be given to him, Ritch and Bulkley.

The more especially when he, Vaughan, that very day, owed Mr. Fayerweather's estate unsecured $500,000 (fol. 3252).

They were met by the unqualified assurance that this
277 entire residue belonged to these three "friends" of Mr. Fayerweather absolutely (2054).

Nor was any hint given them of any trust.

How he emphasized this information, this Court thus describes, to wit:

"His conduct towards that lady, when he shook his fist in her face; and said that he would spend the entire estate, together with his own fortune if necessary, to succeed in the litigation then pending," (to probate this fifth or last codicil), "shows the deep interest he took in the will; and the rights that he claimed under it."

278

But while the engineer and fireman was thus busy; the draughtsman also had not been entirely idle; He had worked earlier; but quite as effectively.

Beside writing himself in for $1,750,000 of residue; and now joining in the assertion that this residue belonged to him and the other two absolutely; and suppressing the proof to the contrary; he had so drawn the chief clause in the will—the one that gave to twenty institutions $2,100,000—that it was all conditioned in his own judgment, and Bulkley's (who knew nothing, so far as the evidence shows, about it), whether any of the twenty bequests in it, of about $100,000 each, should ever reach the insti-

tutions to which Mr. Fayerweather thought he was giving it (fol. 3580).

Bulkley's judgment alone would not do.

It needed Ritch's, too.

So enabling him, if, from his view of the condition and circumstances of any of these twenty institutions, he deemed it expedient to withhold its legacy, to do so.

If he did so, the $100,000 so withheld, or, if he chose, the whole $2,100,000 so withheld, would drop into the residue.

And the two residuary legatees were himself and Bulkley of property now worth about $6,000,000.

277

But, beside his commissions of about.....	$60,000
His absolute ownership of the residue, or about.....	1,750,000
And his ownership, conditional (on his own judgment) of one-half of said $2,100,000, namely, of.....	1,050,000
Or, if Bulkley died shortly before Mr. Fayerweather, and the latter did not learn of it, and change his will, then Ritch's share in said estate, as he had written it (before Vaughan interfered), might have been now not merely $2,800,000 (had	
278 Vaughan remained only an executor, and not a residuary legatee), butabout.....	5,600,000

Far surpassing the most ambitious figure reached by any other draughtsman-legatee, the story of whose efforts I have been able to find in the annals of British or American jurisprudence; and probably breaking the world's record.

Although Ritch himself has testified to the testator's affection and constancy towards his wife; said will and the unburnt codicils give her only a house and stable, worth, together, about.....	100,000

Cash..... 10,000

Then an annuity of $15,000, with this significant provision, drawn by Ritch, to wit:

"To pay the same quarterly, IN THE DISCRETION OF MY EXECUTORS, unto my said wife Lucy, for and during her natural life" (fol. 3571).

Not only did he thus put this infirm and helpless old lady, who before long must die, so completely in his power that she was dependent upon him for the bread
279 she ate (2733);

But, when she found that her loved husband, for fifty years of their married life, had apparently cut her off with about one-fiftieth of his estate; and had put about all the rest (save an annuity to her upon one-twentieth more) absolutely or conditionally into the pockets of three men who were not related to him;

And who told her it was their own absolutely;

Suppressing any hint of any secret instructions to the contrary;

Strange as it may seem, believing that something was wrong, she contested the will, and the first and last unburnt codicils.

She could not use the family lawyer, Ritch, for ob-
280 vious reasons.

So she had to turn elsewhere.

How her "friend" Ritch helped her at this critical time can be judged prseently from his own words; written as soon as he learned that she would contest the will;

And before he had given her a dollar from the estate.

Mr. Fayerweather's only next of kin were three nieces, two of whom, Mrs. Achter and Miss Fayerweather, lived in Iowa.

The other, Mrs. Beardsley. in Bridgeport, Connecticut.

To the two Iowa nieces he bequeathed (to each) $20,000.

To Mrs. Beardsley he bequeathed $100,000.

But as Mrs. Beardsley called the day before he died (fols. 32–38), and said she thought he was going to give her another $100,000 (fol. 3239), and with sisterly thoughtfulness added that $20,000 each would be enough for her two sisters (fol. 3359) as they lived west; Vaughan says, that on that morning of the day he died, Mr. Fayerweather signed a written order (fols. 3245–6) to him and Myrick, his confidential clerk, to give her another $100,000 (fol. 2052). When Vaughan was asked if yet another $125,000 had not (three days before the death) been taken out of the security box by him or Myrick, and paid to

Beardsley or the children; besides $25,000 for him-
281 self;

Ritch's lawyer objected to this question as relating to an act not in or under the will, and the Court excluded it.

So the two Iowa nieces joined in the contest.

How her "friend" Ritch helped the widow at this important time, his own letter marked "private," written as soon as he found that she would contest, will show. It runs thus (fols. 2688–90):

"Private."

"ARNOUX, RITCH & WOODFORD,
18 Wall Street,
"New York, December 10, 1890.

232

"DEAR JUDGE:

"In kindness to Mrs. Fayerweather and Miss Joyce they ought in some way to be informed of the existence in my possession of a prior will, much less favorable to both of them than the present, and with no discretion whatever to the executors, $800 per year to Miss J., and the income of $300,000 to Mrs. F. in addition to real estate.

"Trust estates for life to the daughters of William Fayerweather except $25,000 to Mrs. Beardsley. It is a delicate position for me, and so I put you in possession of this information with liberty to use it as you deem proper.

"Sincerely trusting Mrs. Fayerweather may soon see the hopelessness and unwisdom of a contest with those who desire to be her friends.

"I am very truly yours,

"THOMAS RITCH."

(The italics are mine).

A word of analysis of this "kindness" of Ritch's to the widow will aid in explaining his "delicate position" which so affected him.

By this "prior will" Mrs. Fayerweather had just
233 $10,000 less than by the last will.

But as the old will bequeathed about $1,600,000, and her commission. as its executrix, would be about $16,000, and as the last will drawn by Ritch put her out as executrix and put Ritch in as executor;

So depriving her of any commission, and as the result would be just $6,000 more for Mrs. Fayerweather under the "prior will" than under the last will.

Although there were at least $60,000 more for Ritch himself under the last will than under the "prior will,"

Ritch's omission somehow to explain just how this "prior will" was so "much less favorable" (not to himself) but to the widow "than the present" or last will,

does indeed show that he was, as he said, in a "deli-
234 cate position."

But the "prior will" also affected her in another way.

As it gave the first half of the estate to charity; and and about $600,000 out of the second half also to charity; and Chapter 360 of the Laws of 1860, with which Ritch then had proved so familiar, made such a bequest to charity of all over one-half of an estate void.

And this $600,000 would hence belong, one-half to the widow, and one-half to the next of kin.

It will be seen that, under this "prior will," Mrs. Fayerweather would not only have been better off, as just seen, by..... $6,000

but that she would also have had, under this "prior will," an additional..... 300,000

So that Ritch was quite justified in calling his position "delicate," and in marking this instructive letter "private."

As he was writing to Beardsley:

Whether this "kindness" was to Mrs. Fayerweather; or to Beardsley's wife; in holding over Beardsley this "prior will," will appear from looking into it.

For the "prior will" gave Beardsley's
235 wife in all only..... $25,000

But the last will gave Beardsley's wife.. 100,000

And the dying-day morning "order",—if Ritch saw fit to honor it—another..... 100,000

And Beardsley knows if he had not also had the further..... 125,000

But without it his wife's gain by not having to take merely what the prior will gave her, would be just..... 175,000

Beardsley saw the point. He promptly called on Mrs. Fayerweather; and (fol. 2755) read to her this letter in which her "friend" Ritch calls attention to his own "delicate position."

Notwithstanding Beardsley's promptness; and her "friend" Ritch's "kindness"; and her "friend" Vaughan's "kindness"; and the hopelessness and
236 unwisdom of a contest "with those who desire to be her friends"; the bewildered and grief-stricken widow had to either let this choice little circle of "friends" take about $3,000,000 which she believed belonged to her, and to the next of kin; and appropriate it to their own use; or else make some effort to recover it.

In the contest that followed, her dear "friends," in one sense far the "dearest" she ever had, Ritch, the penman, Vaughan, the foreman, and Bulkley, well meaning, but doing as they did, said that they owned this whole residue absolutely; and asserted that ownership by deeding it all away; not to the twenty colleges selected by Mr. Fayerweather,

But to about thirty-five institutions of their own selection. Word of this came to the widow.

In fact, they made her and the next of kin "gifts" in this deed, provided they would take them;

Of these ladies' own property, to be sure, as this Court says, but of only about twelve per cent. of what they owned. They had the choice. They could take that or less; so they took that. Which perhaps accounts for the strange silence of the releases as to what they actually released.

The only remaining alternative was litigation (fol. 2748)
that would surely outlast the widow in her then pre-
237 carious state; and the only money (fol. 2733) which
she could pay for trying to get her own was in the hands of her "friends," Ritch, Bulkley and Vaughan, and hence a little difficult to get; while the latter had abundance (of the money of these ladies) with which to pay for keeping them out of their own.

Never once did they have an opportunity to get one dollar even of their own (fol. 2733).

As the trial Court did not pass upon how eighty-eight per cent. of their property was thus taken from them; because it said that, by law they had nothing to release; and, as this Court says, they owned every dollar of it; they respectfully ask that the trial Court be directed to
now pass upon the methods by which they were de-
238 prived of their property:

And to determine whether such methods are lawful in this State,

And will meet the sanction of our Courts.

Or whether they have been "deprived of" their "property WITHOUT due process of law."

And as it is in the discretion of the Court to award a jury trial upon these facts;

And as the trial Justice would doubtless gladly avail himself of the aid of a jury;

So helping to bring a speedy determination of these ladies' rights by thirteen of their peers;

They respectfully ask that this Court, either directly provide for a trial by jury of the issues, stated in the annexed notice of motion;

Or that it intimate to the trial Court that, if the latter should submit said questions to a jury for their verdict;

It would meet with the approval of this Court.

And they respectfully pray for such other relief as may be equitable and just.

No previous application has been made for the order now sought.

WILLIAM BLAIKIE.

239

Sworn to before me this 17th day of February, 1897.

CHAS. LYONS, JR.

Notary Public,

N. Y. Co.

240

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at the Capitol in the City of Albany, on the ninth day of March, A. D., 1897.

Present—Hon. CHARLES ANDREWS, Chief Judge presiding.

THE TRUSTEES OF AMHERST COLLEGE and others,
Respondents,

vs.

THOMAS G. RITCH, and others, individually and as Executors, &c., and others,
Appellants.

A motion having been made on behalf of John B. Reynolds, as Executor, &c., and others to amend the Remittitur heretofore issued in the above-entitled action, after hearing Mr. William Blaikie for the motion and Messrs. Elihu Root, C. N. Bovee, Jr., James L. Bishop, William B. Hornblower, John E. Parsons and Alfred W. Kiddle in opposition; and due deliberation having thereupon been had.

Ordered that the said motion to amend be and the same hereby is denied, with costs.

(a copy)

W. H. SHANKLAND,
Clerk.

J. A. S.
Ex.

SUPREME COURT OF THE STATE OF NEW YORK,

CITY AND COUNTY OF NEW YORK.

Exhibit 10.

Referee's Report.

THE TRUSTEES OF AMHERST COLLEGE, The Trustees
241 of Dartmouth College, The Trustees of Hamilton College, The University of Rochester, The President and Trustees of Williams College,

Plaintiff;

against

THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. Vaughan, individually and as Trustees and Executors of the Last Will and Testament and Codicils thereto of Daniel B. Fayerweather, deceased; Bowdoin College, The Union Theological Seminary in the City of New York, Cornell University, Lincoln University, The Rector and Visitors of the University
242 of Virginia, The Hampton Normal and Agricultural Institute, The Adelbert College of the Western Reserve University, Park College, John B. Reynolds and Morris B. Beardsley, as Executors of the Last Will and Codicil of Lucy Fayerweather, deceased; Mary W. Achter, Emma S. Fayerweather, Lucy J. Beardsley, Anner Amelia Reynolds, Northwestern University, The Mt. Sinai Hospital; The Presbyterian Hospital in the City of New York, The Woman's Hospital in the State of New York, The Manhattan Eye and Ear Hospital; The New York Eye and Ear Infirmary, The Manhattan Dispensary, in the City of New York; The Montefiore Home for Chronic Inva-

lids, The Methodist Episcopal Hospital, in the City of Brooklyn, New York; St. Luke's Hospital, in the City of New York; The New York Cancer Hospital, The St. Vincent's Hospjtal, in the City of New York; The Trustees of Union College, in the Town of Schenectady, in the State of New York; Haverford College at Haverford College Post Office, Montgomery County, Penn.; The Universityof the City of New York, The University of Pennsylvania, The Brown University of Providence, R. I.; The President and Fellows of Harvard University; Wesleyan University, at Middletown, Conn.; Princeton College, Princeton, N. J.: Wells
243 College, at Aurora, New York; Elmira Female College, Rutgers College, Vassar College, Poughkeepsie, New York; Barnard College, The Peter Cooper Union for the Advancement of Science and Art, The Shattuck School, at Faribault, Minnesota; Lafayette College, at Easton, Pa.; Maryville College, Trinity College, at Hartford, Conn.; Wabash College, Marietta College, the President and Fellows of Yale College, in New Haven, Conn.; The Trustees of Columbia College, in the City of New York,

Defendants.

244

To the Supreme Court of the State of New York:

Pursuant to the judgment of this Court, entered herein on the 31st day of December, 1894, whereby among other things it was ordered and adjudged that the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan account for all moneys and property which they have received or to which they became entitled as residuary legatees under the last will and testament and codicils of Daniel B. Fayerweather, deceased, before me, the undersigned, who was thereby appointed Referee to take and state such accounts. I do hereby respectfully report as follows:

I.—I first took the oath prescribed by law, which is hereto annexed.

II.—On the 18th of January, 1896, the following parties appeared before me pursuant to a notice filed with me on that day, which notice, with the proof of service thereof, is filed herewith:

The plaintiffs, by Messrs. Putney & Bishop, their attorneys, Mr. Horace Russell appearing as counsel for Dartmouth College.

The defendants Justus L. Bulkley and Henry B.
289 Vaughan, individually and as executors and trustees of Daniel B. Fayerweather, deceased, by their attorneys, Messrs. Parsons, Shepard & Ogden.

The defendant Thomas G. Ritch, individually and as executor and trustee of Daniel B. Fayerweather, deceased, by Messrs. Arnoux, Ritch & Woodford, his attorneys.

The Trustees of Columbia College, in the City of New York, by John McL. Nash, Esq., their attorney.

The Adelbert College of the Western Reserve University, by Messrs. Scott & Upson, its attorneys.

Lincoln University, by Messrs. Hornblower, Byrne & Taylor, its attorneys.

Park College, by Clark Brooks, Esq., its attorney.

290 The Rector and Visitors of the University of Virginia, by Robert C. Taylor, Esq., its attorney.

On February 17, 1896, there appeared before me, pursuant to adjournment and notice, the following parties:

The plaintiffs, by Messrs. Putney & Bishop, their attorneys, Mr. Horace Russell appearing as counsel for Dartmouth College.

The defendants Justus L. Bulkley and Henry B. Vaughan, individually and as executors and trustees of Daniel B. Fayerweather, deceased, by their attorneys, Messrs. Parsons, Shepard & Ogden.

The defendant Thomas G. Ritch, individually and as executor and trustee of Daniel B. Fayerweather, deceased, by Messrs. Arnoux, Ritch & Woodford, his attorneys.

The Trustees of Columbia College, in the City of New York, by John McL. Nash, their attorney.

The Adelbert College, of the Western Reserve University, by Messrs. Scott & Upson, its attorneys.

Lincoln University, by Messrs. Hornblower, Byrne & Taylor, its attorneys.

Northwestern University, by Messrs. Redding & Kiddle, its attorneys.

291 The proceedings before me were continued by adjournment upon the foregoing notices until May 11, 1896, when, by general consent, the reference was adjourned without date, to be brought on on five days' notice by any party. At that time there was awaiting argument the appeal to the Court of Appeals from the judgment in this action, and there were pending before me, as Referee appointed by the Surrogate of the County of New York, the accounts of the defendants Ritch, Bulkley and Vaughan, as executors of said Daniel B. Fayerweather, in proceedings for a third accounting by them as such.

Previously there had been filed with me by the defendants Ritch, Bulkley and Vaughan papers or accounts
292 by which and by the argument of their counsel they claimed that, preliminary to the accounting before me in respect of moneys and property received by them or to which they had become entitled as residuary legatees under the last will and testament and codicils of Daniel B. Fayerweather, deceased, it was necessary that their said accounts as executors should be settled by the Surrogate's Court of the County of New York.

By the decision of the Court of Appeals the judgment in this action having been affirmed, the reference before me was noticed for February 5, 1897. At that time the plaintiffs, by their counsel, Messrs. Bulkley, Ritch & Vaughan, by their counsel, and certain of the other de-

fendants, by their respective counsel, appeared before me, and such proceedings took place that the reference was adjourned to March 17, 1897.

On February 26, 1897, I made an order that the defendants Ritch, Bulkley and Vaughan account before me for all moneys and property which they had received or to which they became entitled as residuary legatees under the will of Daniel B. Fayerweather, deceased, and that such account be in the form of debit and credit.

On March 13, 1897, the said defendants filed with me an account, verified on that day, which is filed herewith.

293 On March 9, 1897, the said defendants gave notice to the attorneys for all the parties who have appeared in this action, that the accounting provided for by the judgment would proceed before me as Referee on March 17, 1897, and that they, the defendants Bulkley, Ritch and Vaughan, would there and then apply to me to proceed with such accounting, the notice stating that it was given to the end that my decision and report, and the judgment to be entered upon such report and decision should be binding upon all the parties to the action.

On March 17, 1897, the defendants Bulkley, Ritch and Vaughan filed with me the said notice, with proof of service thereof upon all the parties who have appeared in the action. The notice and the proof of service

294 thereof are filed herewith.

On March 17th, 1897, or subsequently, the following parties appeared upon the reference before me by their attorneys and counsel:

The plaintiffs by Messrs. Putney & Bishop, their attorneys. Mr. Horace Russell appeared as counsel for Dartmouth College, and Mr. Martin W. Cooke as counsel for Rochester University; and Mr. Elihu Root also appeared as counsel for the plaintiffs.

The defendants Justus L. Bulkley and Henry B. Vaughan, individually and as executors and trustees of Daniel B. Fayerweather, deceased, by their attorneys Messrs. Parsons Shepard & Ogden.

The defendant Thomas G. Ritch, individually and as executor and trustee of Daniel B. Fayerweather, deceased, by Messrs. Arnoux, Ritch & Woodford, his attorneys.

The Trustees of Columbia College, in the City of New York, by John McL. Nash., Esq., their attorney.

Adelbert College of the Western Reserve University by Messrs. Scott & Upson, its attorneys.

Lincoln University by Messrs. Hornblower, Byrne & Taylor, its attorneys.

Park College, by Clark Brooks, Esq., its attorney.

The Rectors and Visitors of the University of Vir-
295 ginia, by Robert C. Taylor, Esq., their attorney.

Northwestern University, by Messrs. Redding & Kiddle, its attorneys.

Hampton Normal and Agricultural Institute, by J. McGregor Smith, Esq., its attorney.

The President and Fellows of Yale College in New Haven, and the Trustees of Rutgers College in New Jersey, by Haley Fiske, Esq., their attorney.

Barnard College, by Messrs. Brownell & Lathrop, its attorneys.

John B. Reynolds and Morris B. Beardsley, as executors of the last will and testament of Lucy Fayerweather, deceased, and Mary W. Achter and Emma S. Fayerweather, by William Blaikie, Esq., their attorney.

296 Mt. Sinai Hospital, by Messrs. Hoadley, Lauterbach & Johnson, its attorneys.

The Trustees of Union College in the Town of Schenectady, in the State of New York, by Messrs. Chanler, Maxwell & Philip.

The President and Trustees of Bowdoin College, by Messrs. Butler, Stillman & Hubbard, their attorneys.

Cornell University, Marietta College and Elmira College, by Messrs. Arnoux, Ritch & Woodford, their attorneys.

Wabash College and Maryville College, by Messrs. Parsons, Shepard & Ogden, its attorneys.

St. Luke's Hospital, by William Bard McVicker, Esq., its attorney.

The Presbyterian Hospital by Messrs. De Forest Bros.

The Manhattan Eye and Ear Hospital, by Messrs. Powel & Krof, its attorneys.

III.—To the account of the said Ritch, Bulkley and Vaughan, filed with me on March 13, 1897, no objections have been filed.

By such account it appears, and the fact is, that there have been three accountings by the defendants Bulkley, Ritch and Vaughan, as executors of the said Daniel B. Fayerweather, before the Surrogates of the County of New York, which have resulted in decrees judicially settling the accounts of the said executors. The third
297 accounting resulted in my report, as Referee, filed on the 8th day of September, 1896, by which report it was decided that the balance in the hands of the said defendants, as executors, on the 3d day of May, 1895, consisting of cash and securities, amounted to $2,772,685.20, subject to the deduction of the amount of their commissions, the expenses of their accounting and the costs and expenses incurred and to be incurred in the further administration of the estate, and to the payment of unpaid legatees. All the parties to this action were parties to that accounting. On June 12, 1897, a decree was entered confirming my said report and directing the said defendants Ritch, Bulkley and Vaughan, as such executors, to pay and turn over to themselves, as legatees, the re-
298 siduary estate of the said Daniel B. Fayerweather, after payment of their lawful commissions, and of all lawful costs and expenses, including taxes, which theretofore had been or thereafter should be incurred by the said executors, or which theretofore had, or thereafter should, become a charge against the estate of the said Daniel B. Fayerweather, until the close of their administration thereof as such executors.

Since the date down to which that account proceeded, further moneys have come into the hands of the defend-

ants Bulkley, Ritch and Vaughan, as executors of the said Daniel B. Fayerweather, and payments have been made by them, which are set forth in the said account filed with me on March 13, 1897. By that account it appears, and the fact is, that at its date the residuary estate to which the defendants Bulkley, Ritch and Vaughan would become entitled as residuary legatees under the last will and testament of Daniel B. Fayerweather consisted as follows:

Cash	$573,993 74
Bonds and mortgages enumerated in Schedule D of said account	2,502,412 99
Unsold inventoried property as shown in Schedule B of said account	12,750 00
	$3,089,156 73

299

And in addition thereto:

Certain leasehold and freehold property which are set forth in Schedule E of said account.

Less certain amounts hereinafter referred to, that is to say:

(1). The following amounts unpaid upon legacies left by the eighth clause of the will of the said Daniel B. Fayerweather, directed to be paid by the decree of
300 the Surrogate's Court hereinbefore mentioned:

St. Luke's Hospital, N. Y. City	$1,250	
Presbyterian Hospital, N. Y. City	1,250	
Manhattan Eye and Ear Infirmary, N. Y. City	500	
Woman's Hospital, N. Y. City	500	
Mt. Sinai Hospital N. Y. City	500	
		$4,750 00

With interest thereon from February 28, 1892.

(2). The following amounts unpaid of legacies left by the ninth clause of the bill of the said Daniel B. Fayerweather and directed to be paid by the said decrees as follows:

	Principal	Interest to May 12, 1897.	Principal and Interest to May 12, 1897.
Bowdoin College	$4,750	$4,457 66	$9,207 66
Dartmouth College	4,750	4,445 95	9,195 95
Amherst College	4,750	4,430 34	9,180 34
Wesleyan University	4,750	4,450 63	9,200 63
Yale College	14,250	13,358 90	27,608 90
301 Columbia College	10,000	10,797 66	20,797 66
Hamilton College	5,000	5,411 35	10,411 35
The University of Rochester	5,000	5,358 91	10,358 91
Cornell University	10,000	10,779 02	20,779 02
Lafayette College	2,375	2,202 29	4,577 29
Lincoln University	4,750	4,514 85	9,264 85
The University of Virginia	4,750	4,455 31	9,205 31
Hampton University	4,750	4,441 26	9,191 26
Maryville College	4,750	4,452 97	9,202 97
Marietta College	2,375	2,226 44	4,601 44
Adelbert College	2,375	2,226 44	4,601 44
Wabash College	2,375	2,226 44	4,601 44
Park College	2,375	2,242 19	4,617 19
Williams College	4,750	4,441 26	9,191 26
Union Theological Seminary	2,500	2,703 46	5,203 46
302	$101,375	$99,623 33	$200,998 33

with interest on each of the above amounts of principal unpaid on the last mentioned legacies from May 12th, 1897.

(3). Any further proper costs and expenses, including

taxes incurred, and to be incurred by the executors until the close of their administration as such.

(4). The amount unpaid of an annuity of $4,000 a year to the defendant, Anner Amelia Reynolds, left to her by the will and codicil of the said Daniel B. Fayerweather, as shown by the exhibit hereinafter referred to and marked "*Reynolds Ex. No.* 1, *May* 12, 1897, *C. B.*" $22,412.50.

That annuity was conditioned that the said Anner Amelia Reynolds, then Anner Amelia Joyce, should
303 not marry. She was married to the defendant John B. Reynolds on July 11th, 1891. The annuity was paid to that time. By a settlement to which all the parties in interest consented, that annuity was made payable to the said Anner Amelia Reynolds as long as she lives, notwithstanding her marriage.

It appears before me that the said Anner Amelia Reynolds has not received the annuity due her since May 15, 1892. A request has been made herein on her behalf by her attorney of record herein that the balance of her annuity and the interest on the several payments that she was entitled to from the time they became due be included in the judgment or decree to be made herein, and the
304 claim is made in her behalf that the total of the said payments to which she is entitled, with interest, as computed by her said attorney, amounts to the said sum $22,412.50, including all payments and interest up to May 15, 1897, as will appear by reference to the communication of William Blaikie, Esq., to Messrs. Parsons, Shepard & Ogden, as attorneys for certain of the executors, dated May 11, 1897, filed as part of the record of these proceedings, and marked "*Reynolds Ex. No.* 1, *May* 12, 1897, *C. B.*" As no objection is made by any party to the allowance of such claim, I find that such claim should be paid, and that a decree or judgment herein should

provide for the payment of the same out of the funds in the hands of the said executors.

(5). Interest from July 15, 1892, upon the sum of $4,166.67 due at the time of her death to Lucy Fayerweather on account of the annuity provided by the will of the said Daniel Fayerweather, as increased by settlement and agreement of the parties in interest $1,041.51.

At the date of her death there remained unpaid to her the said sum of $4,166.67. That sum was tendered to the
defendant, John B. Reynolds, one of her executors,
305 in a check, which was subsequently returned by him
to the defendants Ritch, Bulkley and Vaughan, as executors of the said Daniel B. Fayerweather. In their previous accounts they have had credit for the said sum of $4,166.67. As, however, that amount was not paid, and has continued in the estate and has drawn interest, interest to the time of payment at the rate of five per cent. per annum should be paid from the estate; and there should also be paid by the said executors the said sum of $4,166.67, although for that amount there should not be a second credit to them. The above amount of interest, $1,041.51, is fixed in accordance with a claim made and set forth in said exhibit on behalf of the executor of the
will of Lucy Fayerweather, deceased, wherein the
306 amount of the principal of said annuity due such ex-
ecutor is stated to be $4,166.67, and the amount of interest thereon to May 15, 1897, to be the said sum of $1,041.51. As no objection is made to the allowance of this claim, so made by the executor of Mrs. Fayerweather, I find that said claim should be allowed and should be paid out of the funds in the hands of the executors; and that directions for such payment should be set forth in the judgment or decree to be entered herein.

(6). The costs and allowances of this action which are to be paid from the estate.

For further information from which to ascertain the amount of the said residuary estate, reference is made to the said account of said Ritch, Bulkley and Vaughan as filed with me March 13, 1897, which account is hereby approved and allowed in all respects.

IV.—By the fifth clause of the will of the said Daniel B. Fayerweather, he gave to the said Bulkley, Ritch and Vaughan such sum as would, in their judgment, be sufficient to produce the net annual income of fifteen thousand dollars ($15,000), to have and to hold the same in
307 trust, to invest and reinvest the same as in said fifth clause directed, and to pay the income, profits and issues thereof in quarterly payments to Lucy Fayerweather, the widow of the said Daniel B. Fayerweather, during her life. By an agreement entered into by and between all parties in interest the provision so made for the said Lucy Fayerweather was increased from the sum of fifteen thousand dollars ($15,000) a year to the sum of twenty-five thousand dollars ($25,000) a year. By the sixth clause of the said will of the said Daniel B. Fayerweather he gave to the said Anner Amelia Joyce, now Anner Amelia Reynolds, so long as she should remain unmarried, an annuity of one thousand dollars ($1,000), and
308 by the said sixth clause the said Daniel B. Fayerweather directed the said Bulkley, Ritch and Vaughan to invest such sum from his estate as should secure the payment of said annuity. By the third clause of the third codicil of the said will the said Daniel B. Fayerweather directed that such annuity for the said Anner Amelia Joyce should be increased from the sum of one thousand dollars ($1,000) to four thousand dollars ($4,000), and thereafter by agreement entered into by and between all parties in interest, the said annuity was continued during the life of the said Anner Amelia Joyce, notwithstanding her marriage. For the purpose of providing for the payment to the said Lucy Fayerweather of the said sum of twenty-five thousand dollars ($25,000) a

year, and to the said Anner Amelia Joyce of the said sum of four thousand dollars ($4,000) a year, the said Bulkley, Ritch and Vaughan set aside and invested in bonds and mortgages the sum of six hundred and forty eight thousand dollars ($648,000). Upon the termination of the obligation under the said will, codicil and agreements to pay the said sum of twenty-five thousand dollars ($25,000) as hereinbefore set forth, such investments remained in the hands of the said Bulkley, Ritch and Vaughan, subject only to the obligation under said will, codicil and agreements to pay to the said Anner Amelia Reynolds the said annual sum of $4,000.

309 In arriving at the cash in the hands of the said Bulkley, Ritch and Vaughan for distribution, as hereinbefore stated, I have allowed the sum of twenty thousand and ten dollars ($20,010) as an additional commission upon the said sum of six hundred and forty-eight thousand dollars ($648,000).

V.—I further report that for the purpose of raising the said annuity of $4,000 a year for Anner Amelia Reynolds, hereinbefore referred to, the sum of $125,000, consisting, in whole or in part, in the discretion of the defendants Ritch, Bulkley and Vaughan, of mortgages belonging to the estate of Daniel B. Fayerweather in their hands, should be set aside as a trust fund, and that such
310 trust fund, upon the consent of all the parties interested, should be paid into a trust company to be agreed upon by all parties interested, to be by such company held upon trust to receive the income and profits thereof, and to pay over the same to the extent of $4,000 per annum to the said Anner Amelia Reynolds during her life, and upon her death to distribute the said principal sum and any income which may have accrued thereon equally, share and share alike, between the institutions named in the ninth paragraph of the will of the said Daniel B. Fayerweather. In the absence of such consent, the said trust fund should be held and retained by the said Ritch, Bulkley and Vaughan upon such trust, unless otherwise directed by this Court.

VI.—The following actions have been brought by the said John B. Reynolds, as executor of the said Lucy Fayerweather, that is to say:

Two actions have been commenced and are now pending in this Court, one of them on or about the 16th day of November, 1896, and the other on or about the 24th day of February, 1897, each brought by the defendants John B. Reynolds, as executor of the last will and testament of Lucy Fayerweather, deceased, Anner Amelia Reynolds, Mary W. Achter and Emma S. Fayerweather against the defendant Vaughan and others upon the claim that
311 that the said Daniel B. Fayerweather left a codicil subscribed and executed by him on November 11, 1890, by which he made specific bequests to the said Lucy Fayerweather and Anner Amelia Reynolds, devising and bequeathing to the plaintiffs in those actions property to a large amount—part of his estate—the amount in one action being specified as $2,500.000. No such codicil was proved as part of the will and codicils of the said Daniel B. Fayerweather as duly admitted to probate by the Surrogates of the County of New York. The said Lucy Fayerweather and the plaintiffs Anner Amelia Reynolds, Mary W. Achter and Emma S. Fayerweather were parties to the proceedings for the probate of the will of the said Daniel B. Fayerweather, deceased.

312 A suit has also been begun by the said John B. Reynolds, as such executor, against the said Bulkley, Ritch and Vaughan in the United States Circuit Court for the Southern District of New York. In that suit a bill and an amended bill have been filed in the office of the Clerk of that Court wherein the said John B. Reynolds, as such executor, claims that the judgment in this action is invalid and prays for the decree of the said Circuit Court declaring that the said Bulkley, Ritch and Vaughan hold all of the estate of the said Daniel B. Fayerweather, except the legacies given to individuals by his will and codicils thereto, as trustees for, and to pay the same to, the said Lucy Fayerweather, Emma S. Fayerweather and Mary W. Achter.

The said John B. Reynolds, as such executor of the said Lucy Fayerweather, was a party defendant to this action. By the interlocutory judgment herein it is adjudged:

"*Fifth.*—That out of the sums in the hands of the said defendants Ritch, Bulkley and Vaughan, or for which they are found to be accountable as such residuary legatees, they pay the sum of $100,000 to the Northwestern University, with its just and equitable proportion of the income, earnings and interest accrued upon the trust
313 fund as between it and the institutions named in the ninth clause of the will, and pay over the remainder one-twentieth part thereof to the plaintiff Trustees of Amherst College, one-twentieth part thereof to the plaintiff Trustees of Hamilton College, one-twentieth part thereof to the plaintiff the President and Trustees of Williams College, one-twentieth part thereof to the plaintiff the Trustees of Dartmouth College, and one-twentieth parth thereof to the University of Rochester, and one-twentieth part thereof to each of the defendants named in the ninth article of the said will, to wit, the President and Trustees of Bowdoin College, Wesleyan University, the President and Fellows of Yale College, the Trustees of Columbia College, in the City of New York; the
314 Union Theological Seminary, in the City of New York; Cornell University, Lafayette College, Lincoln University, the Rector and Visitors of the University of Virginia, the Hampton Normal and Agricultural Institution, Maryville College, Marietta College, The Adelbert College of the Western Reserve University, Wabash College and Park College."

The said John B. Reynolds, as such executor, Mary W. Achter and Emma S. Fayerweather, were also parties to said accountings of the defendants Ritch, Bulkley and Vaughan, as such executors of the said Daniel B. Fayerweather, before the Surrogates of the County of New York.

VII.—By a supplemental account filed by the defendants Ritch, Bulkley and Vaughan, it appears, and the fact is, that on the 16th day of June, 1897, the cash in their hands on March 13, 1897, had been increased from the sum of $573.993.74 to $2,031,493.71, the amount invested in mortgages being correspondingly reduced. A schedule of the bonds and mortgages belonging to the estate on the 16th day of June, 1897, is hereto annexed, marked "Schedule A."

VIII.—Upon the reference before me it was consented by all parties that the said Ritch, Bulkley and
315 Vaughan spend a sum not to exceed $12,500 in the repair and permanent care of the tomb of the said Daniel B. Fayerweather, in Woodlawn Cemetery.

IX.—I am of opinion, and I accordingly report, that there should be made by the said executors the payments mentioned in subdivisions III and VIII of this report; that, after retaining or paying over the trust fund of $125,000 referred to in subdivision V of this report, the residue of cash, which will remain in their hands, be treated as paid over by them to themselves as trustees to pay, and that they do pay, in the first place, to the Northwestern University, the sum of one hundred thou-
sand dollars ($100,000), together with interest there-
316 on at the rate of five per cent. per annum from February 28, 1892, that rate of interest having been agreed to by the parties concerned as payable in accordance with the directions of the interlocutory judgment; and to distribute, and that they do distribute, that which shall remain, equally among the twenty institutions named in the ninth article of the will of the said Daniel B. Fayerweather, such distribution to be made within ten days from the entry of the final judgment in this action at the office of the executors of the will of the said Daniel B. Fayerweather, No. 38 Park Row, in the City of New York.

X.—And I further report, that they, the said defendants Ritch, Bulkley and Vaughan, as executors, should proceed to close up the administration of the estate, turning the assets into money as rapidly as in their judgment may be safely done, due regard being had to the interest of the estate, and that as moneys shall be realized from time to time they make distribution thereof equally among such institutions, retaining only an amount sufficient to cover their proper costs and expenses, and that the judgment to be entered upon this report should contain a provision permitting them from time to time to account before a referee to be appointed for the pur-
317 pose with power to fix and determine their costs and expenses to the end that final distribution of the entire estate may be provided for, and with the right either to them or to either of the institutions named in the ninth article of the will of the said Daniel B. Fayerweather at any time to apply to the Court for further instructions.

All of which is respectfully submitted.

CHARLES W. DAYTON,

Referee.

318 Dated New York City, June 16, 1897.

SUPREME COURT.

NEW YORK COUNTY.

THE TRUSTEES OF AMHERST COLLEGE, *et al.*,

Plaintiffs,

319

against

THOMAS G. RITCH, Etc., *et al.*,

Defendants.

Exhibit No. 11

Exceptions to Referee's Report.

The defendants John B. Reynolds, as sole executor of the last will and codicil of Lucy Fayerweather, deceased; Mary W. Achter and Emma S. Fayerweather, hereby except to the decision, findings and report dated June 16, 1897, of Hon. Charles W. Dayton, the Referee herein, upon the following grounds, to wit;

320

First.—Because said Referee should have inserted and did not insert, after the words "from May 12, 1897," in folio 33 of said report these words, to wit:

> "Provided that the judgment referred to in folio 35 of said report shall finally stand, and shall not be affected by the final determination of either of the two actions described in Paragraph VI of said report."

Second.—Because said Referee should have provided

and did not provide in folio 35 of his report after the words "judgment or decree to be made herein," as follows, to wit:

> "Provided that said judgment shall finally stand, and shall not be affected by the final determination of either of the two actions described in Paragraph VI of said report."

Also by inserting the same proviso after the word "Executors" in folio 37 of said report, and after the words "entered herein" in folio 40 thereof.

321

Third.—Because said Referee should have inserted, and did not insert, after the word "Vaughan," in Paragraph V, folio 45, of said report, these words, to wit:

> "And subject to the approval of the said Anner Amelia Reynolds, or of her attorney."

Fourth.—Because said Referee should have inserted, and did not insert after the words "during her life" in folio 46 of said report, these words, to wit:

322

> "But if said income and profits at any time prove insufficient to so pay to her said annuity of $4,000 a year, then, in that case, payment shall be made to her, out of said principal amount of $125,000 of such sum as shall be necessary to make up any such deficiency in said income and profits, so that she shall receive in all from said trust fund each year the sum of four thousand dollars ($4,000) without any deduction whatever, the payments thereof to be made to her quarterly, to wit, upon the fifteenth day of February, May, August and November in each year."

Fifth.—Because said Referee should have stricken out and did not strike out from folio 54 of said report these words, to wit:

"Not to exceed $12,500 in;"

and should substitute for them these words, to wit:

"Amply to provide for."

Sixth.—Because said Referee did not insert, and should have inserted in Paragraph IX, folio 55 of his said report after the words "the residue of cash," the following words, to wit:

"And all other property."

323 *Seventh.*—Because said Referee should have left out, and did not leave out of Paragraph IX, of said report all of said paragraph after the words "as Trustees" in folio 55; and he should insert instead immediately after said word "Trustees" these words, to wit:

"To keep said residue securely and legally invested until the final determination of the two actions referred to in Paragraph VI of said report; and upon such final determination of said two actions, to pay over and distribute said residue, with all increase and interest thereof which shall have then accrued, to such party or parties as are declared by the final decree rendered in the final determination of said two actions to be the lawful
324 and rightful owners thereof."

Eighth.—Because said Referee did not insert, and should have inserted in said report, that these exceptants duly protested before him at the hearings herein against the payment of any and all money out of the estate of said Daniel B. Fayerweather, deceased; to any of the educational corporations named in the ninth clause of the last will of said Daniel B. Fayerweather, deceased, and to any payment or payments to be made hereafter of any money or other property of the estate of said deceased to any of said corporations named in said ninth clause; and also to the Northwestern University, until the decree made upon

the final determination of said two actions referred to in Paragraph VI. of said report.

Dated New York, June 23, 1897.

WILLIAM BLAIKIE,
Attorney for John B. Reynolds, as sole Executor of Lucy Fayerweather, deceased; Mary W. Achter and Emma S. Fayerweather, Defendants.

325 To Messrs. PUTNEY & BISHOP,
Plaintiffs' Attorneys, 115 Broadway, New York.

Messrs. PARSONS, SHEPARD & OGDEN,
Attorneys for Defendants Bulkley, Vaughan, Wabash College and Maryville College. 111 Broadway, New York.

Messrs. ARNOUX, RITCH & WOODFORD,
Attorneys for Defendants Ritch, Cornell University and Marietta College, 18 Wall Street, New York.

Mr. HALEY FISKE,
Attorney for Yale University, 1 Madison Avenue,
326 New York.

Messrs. BUTLER, STILLMAN & HUBBARD,
Attorneys for Bowdoin College, 54 Wall Street, New York.

Messrs. ADAMS & COMSTOCK,
Attorneys for Union Theological Seminary, 36 Wall Street, New York.

Mr. JOHN M. NASH,
Attorney for the Trustees of Columbia College, in the City of New York, 63 Wall Street, New York.

To Messrs. G. G. & F. Reynolds,
Attorneys for Wesleyan University, 16 Court Street, Brooklyn, N. Y.

Mr. Clark Brooks,
Attorney for Park College, 54 William Street, New York.

Messrs. Redding & Kiddle,
Attorneys for Northwestern University, 41 Park Row, New York.

J. M. Smith, Esq.,
327 Attorney for Hampton Normal and Agricultural Institute, 32 Nassau Street, New York.

Messrs. Scott & Upson,
Attorneys for Adelbert College of the Western Reserve University, 59 Wall Street, New York.

Henry D. Purroy, Esq.,
Clerk of the Supreme Court, County Court House, New York.

Messrs. Hornblower, Bryne & Taylor,
Attorneys for Lincoln University, 30 Broad
328 Street, New York.

Wager Swayne, Esq.,
Attorney for Lafayette College, at Easton, Pa., 120 Broadway, New York.

Remittitur, March 9, 1897.

THE TRUSTEES OF AMHERST COLLEGE *et al.*,
Respondents,

vs.

THOMAS G. RITCH and others,
Appellants.

Be it remembered that on the 14th day of February, in in the year of our Lord one thousand eight hundred and ninety-six, Thomas G. Ritch and others, as executors, &c., the appellants in this action, came here into the Court of Appeals, by Arnoux, Ritch & Woodford and William Blaikie, their attorneys, and filed in the said Court a notice of appeal and return thereto from the judgment of the General Term of the Supreme Court of the State of New York, and the trustees of Amherst College *et al.*, the respondents in said action, afterwards appeared in said Court of Appeals by Putney & Bishop, their attorneys, which said notice of appeal and return thereto, filed as aforesaid, are hereunto annexed.

Whereupon said Court of Appeals, having heard the cause argued by Messrs. Edward C. James, James C. Carter, John E. Parsons and others, of counsel for the appellants, and by Elihu Root, James L. Bishop, William B. Hornblower and others, of counsel for the respondents, and after due deliberation had therein, did order and adjudge the judgment of the General Term of the Supreme Court for the First Judicial Department, appealed from herein to this Court, be and the same hereby is affirmed, with costs; all parties appearing by separate attorneys, payable out of the State. And it was also further ordered that the record aforesaid and the proceedings in this Court

be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, &c., as aforesaid, and hereupon as well as the notice of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted unto the Supreme Court of the State of New York, before the Justices thereof, according to the form of the Statute in said case made and provided, to be enforced according to law, and which record now remains in said Supreme Court before the Justices thereof.

GORHAM PARKS,
Clerk of Court of Appeals
State of New York.

Court of Appeals, Clerk's office, March 9, 1897.

J. A. S.,
Ex.

Order making Judgment of Court of Appeals the Judgment of the Supreme Court.

Exhibit 12.

At a Special Term of the Supreme Court of the State of New York, Part II, held at the County Court House in the City of New York, on the tenth day of March, 1897.

Present.—Hon. MILES BEACH, Justice.

THE TRUSTEES OF AMHERST COLLEGE, The Trustees
329 of Dartmouth College, Hamilton College, The University of Rochester, The President and Trustees of Williams College,

Plaintiffs,

against

THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. Vaughan, individually and as Trustees and Executors of the Last Will and Testament and Codicils thereto of Daniel B. Fayerweather, deceased; Bowdoin College, The Union Theological Seminary in the City of New York, Cornell University, Lincoln University, The Rector and Visitors of the University
330 of Virginia, The Hampton Normal and Agricultural Institute, The Adelbert College of the Western Reserve University, Park College, John B. Reynolds and Morris B. Beardsley, as Executors of the Last Will and Codicil of Lucy Fayerweather, deceased; Mary W. Achter, Emma S. Fayerweather, Lucy J. Beardsley, Anner Amelia Reynolds, Northwestern University, The Mt. Sinai Hospital; The Presbyterian Hospital in the City of New York, The Woman's Hospital in the State of New York, The Manhattan Eye and Ear Hospital; The New York Eye and Ear Infirmary, The Manhattan Dispensary, in the City of New York; The Montefiore Home for Chronic Inva-

lids, The Methodist Episcopal Hospital, in the City of Brooklyn, New York; St. Luke's Hospital, in the City of New York; The New York Cancer Hospital, The St. Vincent's Hospital, in the City of New York; The Trustees of Union College, in the Town of Schenectady, in the State of New York; Haverford College at Haverford College Post Office, Montgomery County, Penn.; The University of the City of New York, The University of Pennsylvania, The Brown University of Providence, R. I.; The President and Fellows of Harvard University; Wesleyan University, at Middletown, Conn.; Princeton College,
331 at New Brunswick, N. J.; Wells College, at Aurora, New York; Elmira Female College, Poughkeepsie, New York; Barnard College, The Peter Cooper Union for the Advancement of Science and Art, The Shattuck School, at Faribault, Minnesota; Lafayette College, at Easton, Pa.; Maryville College, Trinity College, at Hartford, Conn.; Wabash College, Marietta College, the President and Fellows of Yale College, in New Haven, Conn.; The Trustees of Columbia College, in the City of New York,

Defendants.

332

On reading and filing the remittitur of the Court of Appeals of the State of New York in this action, and on application of Messrs. Putney & Bishop, attorneys for the plaintiffs, above named, it is

Ordered, that the judgment of the said Court of Appeals be, and the same hereby is, made the judgment of this Court.

MILES BEACH,

J. S. C.

Final Judgment.

Exhibit 13.

At a Special Term of the Supreme Court of the State of New York, held at the County Court House, in the City of New York, on the 6th day of July, 1897.

333 *Present.*—Hon. ROGER A. PRYOR, Justice.

THE TRUSTEES OF AMHERST COLLEGE, The Trustees of Dartmouth College, The Trustees of Hamilton College, The University of Rochester, The President and Trustees of Williams College,

Plaintiffs,

against

THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN, individually and as Trustees and Executors of the Last Will and Testament and Codicils
334 thereto of Daniel B. Fayerweather, deceased; Bowdoin College, The Union Theological Seminary in the City of New York, Cornell University, Lincoln University, The Rector and Visitors of the University of Virginia, The Hampton Normal and Agricultural Institute, The Adelbert College of the Western Reserve University, Park College, John B. Reynolds and Morris B. Beardsley, as Executors of the Last Will and Codicil of Lucy Fayerweather, deceased; Mary W. Achter, Emma S. Fayerweather, Lucy J. Beardsley, Anner Amelia Reynolds, Northwestern University, The Mt. Sinai Hospital, The Presbyterian Hospital in the City of New York, The Woman's Hospital in the State of New York, The Manhattan

Eye and Ear Hospital, The New York Eye and Ear Infirmary, The Manhattan Dispensary, in the City of New York; The Montefiore Home for Chronic Invalids, The Methodist Episcopal Hospital in the City of Brooklyn, New York; The New York Cancer Hospital, The St. Vincent's Hospital, in the City of New York; The Trustees of Union College, in the Town of Schenectady, in the State of New York; The University of Pennsylvania, The Brown University, of Providence, R. I.; the President and Fellows of Harvard University; Wesleyan University, at Middletown, Conn.; Princeton College, at New Bruns-
335 wick, N. J.; Wells College, at Aurora, New York; Elmira Female College, Rutgers College, Vassar College, Poughkeepsie, New York; Barnard College, The Peter Cooper Union for the Advancement of of Science and Art, The Shattuck School at Faribault, Minnesota; Lafayette College at Easton, Pa.; Maryville College; Trinity College, at Hartford, Conn.; Wabash College, Marietta College, the President and Fellows of Yale College, in the City of New Haven; The St. Luke's Hospital, in the City of New York,

Defendants.

336

This action having been tried at a Special Term of this Court, Mr. Justice Truax presiding, held at the City of New York, and a decision having been made and filed herein on the 31st day of December, 1894, and the judgment having been duly entered thereon on the 31st day of December, 1894, in the office of the Clerk of the City and County of New York, by which judgment it was determined and adjudged that the residuary estate devised and bequeathed to the defendants Thomas G. Ritch, Justus L. Bulkley, and Henry B. Vaughon, by the last will and testament and codicils of Daniel B. Faverweather, deceased, is held in trust by them for the plaintiffs, to

wit: The Trustees of Amherst College, Trustees of Hamilton College, The University of Rochester, The President and Trustees of Williams College, and for the institutions named in the ninth paragraph of the said will, to wit: The President and Trustees of Bowdoin College, sued as Bowdoin College; Wesleyan University, the President and Fellows of Yale College, the Trustees of Columbia College, in the City of New York; the Union Theological Seminary, in the City of New York; Cornell University, Lafayette College, Lincoln University, the Rector and Visitors of the University of Virginia, the Hampton Normal and Agricultural Institution, Maryville Col-
337 lege, Marietta College, the Adelbert College of the Western Reserve University, sued as Adelbert College; Wabash College and Park College and for the Northwestern University, upon the trusts therein stated.

And that the said residuary estate is so held by the said defendants in trust to sell and convert the same into cash, and to divide the same except that part thereof necessary to provide for the payments mentioned in the third paragraph of the plaintiffs' prayer for relief in the complaint herein as follows: To the Northwestern University, $100,000, with its just and equitable proportion of the income, earnings and interest accrued upon the trust from as between it and the institutions named in the ninth clause of the will, and to each of the said plaintiffs,
338 and to each of the other defendants above named, mentioned in the ninth paragraph of the said will, the remainder thereof in equal parts, and that said defendants Ritch, Bulkley and Vaughan and each of them. their attorneys, agents and servants, be restrained and enjoined from distributing the said residuary estate or any part thereof under the deed of gift mentioned in and annexed to the complaint, except as directed by said judgment, and that the said defendants account for all moneys and property which they have received or to which they became entitled as such residuary legatees under the last will and testament and codicils of the said Daniel B. Fayerweather, deceased, before Charles W.

Dayton, Esq., who was appointed Referee to take and state said accounts, and that out of the sums in the hands of the said defendants Ritch, Bulkley and Vaughan, or for which they are found to be accountable as such residuary legatees, they pay the sum of $100,000 to the Northwestern University, with its just and equitable portion of the income, earnings and interest accrued upon the trust found as between it and the institutions named in the ninth clause of the will, and pay over the remainder one-twentieth part thereof to the plaintiff the Trustees of Amherst College; one-twentieth part thereof to the plaintiff the Trustees of Hamilton College; one-twentieth
339 part thereof to the plaintiff the President and Trustees of Williams College; one-twentieth part thereof to the plaintiff the Trustees of Dartmouth College; one-twentieth part thereof to the University of Rochester; one-twentieth part thereof to each of the defendants named in the ninth article of said will, to wit: The President and Trustees of Bowdoin College, Wesleyan University, the President and Fellows of Yale College, the Trustees of Columbia College in the City of New York, The Union Theological Seminary in the City of New York, Cornell University, Lafayette College, Lincoln University, the Rectors and Visitors of the University of Virginia, the Hampton Normal and Agricultural Institution, Maryville College, Marietta College, the Adelbert Col-
340 lege of the Western Reserve University, Wabash College and Park College. And that the plaintiffs recover their costs as therein provided, and that certain costs be paid to certain of the defendants as therein provided; and the said judgment having been duly affirmed by the General Term of the said Supreme Court by an order and judgment duly made an entered in the office of the Clerk of the City and County of New York, on the 30th day of December, 1895, by which said judgment certain sums were awarded to the plaintiffs and to certain of the defendants as costs, to be paid out of the estate of the said Daniel B. Fayerweather, deceased, and the said last named judgment having been duly affirmed by the judg-

ment of the Court of Appeals, which was made the judgment of this Court by an order duly made and entered in the office of the Clerk of the City and County of New York on the day of February, 1897, by which said judgment costs were awarded to the plaintiffs and to each of the defendants who had appeared by separate attorneys.

And the said Charles W. Dayton, Referee named in the said judgment, having on the 16th day of June, 1897, made and filed his report, from which it appears that the residuary estate to which the defendants Ritch, Bulkley and Vaughan have become entitled under the last
341 will and testament of Daniel B. Fayerweather, deceased, consists as follows:

Cash	$2,031,493 71
Bonds and mortgages	1,044,912 99
Unsold inventoried property, as shown in Schedule B of said account	12,750 00

And in addition thereto, certain leasehold and freehold property, which is set forth in Schedule E of said account, less certain amounts set forth in said report, that is to say:

(1). The following amounts unpaid upon legacies left by the eighth clause of the will of the said Daniel B.
342 Fayerweather:

St. Luke's Hospital, N Y. City	$1,250 00
Presbyterian Hospital, N. Y.	1,250 00
Manhattan Eye and Ear Infirmary. N. Y. City	1,250 00
Woman's Hospital, N. Y. City	500 00
Mt. Sinai Hospital, N. Y. City	500 00

With interest thereon from February 28, 1892.

(2). The following amounts unpaid of legacies directed to be paid by the said Daniel B. Fayerweather:

	Principal	Interest to May 12, 1897.	Principal and Interest to May 12, 1897.
Bowdoin College	$4,750	$4,457 66	$9,207 66
Dartmouth College	4,750	4,445 95	9,195 95
Amherst College	4,750	4,430 34	9,180 34
Wesleyan University	4,750	4,450 63	9,200 63
Yale College	14,250	13,358 90	27,608 90
Columbia College	10,000	10,797 66	20,797 66
Hamilton College	5,000	5,411 35	10,411 35
343 The University of Rochester	5,000	5,358 91	10,358 91
Cornell University	10,000	10,779 02	20,779 02
Lafayette College	2,375	2,202 29	4,577 29
Lincoln University	4,750	4,514 85	9,264 85
The University of Virginia	4,750	4,455 31	9,205 31
Hampton University	4,750	4,441 26	9,191 26
Maryville College	4,750	4,452 97	9,202 97
Marietta College	2,375	2,226 44	4,601 44
Adelbert College	2,375	2,226 44	4,601 44
Wabash College	2,375	2,226 44	4,601 44
Park College	2,375	2,242 19	4,617 19
Williams College	4,750	4,441 26	9,191 26
Union Theological Seminary	2,500	2,703 46	5,203 46
344	$101,375	$99,623 33	$200,998 33

(3). Any further charges and expenses, including taxes incurred, or to be incurred by the executors until the close of their administration as such.

(4). The amount unpaid of an annuity of $4,000 a year to the defendant Anner Amelia Reynolds, which has accrued since May 5, 1892, amounting with interest to May 15, 1897, to $22,412.50.

(5). The sum of $4,166.67, with interest from July 15,

1892, to be paid to the executors of Lucy Fayerweather, being the annuity due at the time of her death, with interest thereon.

(6). The costs of this action, which are to be paid from the estate as specified in the judgments hereinbefore recited.

And it appearing that due notice of the filing of the said report has been duly given to each of the defendants and no exceptions having been filed to the said report,
and the time within which exceptions might be filed
345 having expired, except that exceptions have been
filed by the plaintiffs and by John B. Reynolds, as sole executor of Lucy Fayerweather, deceased, Mary W. Achter and Emma S. Fayerweather, and by the Northwestern University.

And the said Referee having reported also as to certain other matters material to the determination and distribution of the said residuary estate.

And the said action coming on for hearing and disposition upon motion for judgment, due notice of which has been duly given to all the parties to the action.

And the plaintiffs appearing by Messrs. Putney & Bishop, their attorneys, and Elihu Root, Horace Russell
and Martin W. Cooke, as counsel; and the defend-
346 ants Bulkley and Henry B. Vaughan, individually,
and as executors and trustees of Daniel B. Fayerweather, deceased, by their attorneys, Messrs. Parsons, Shepard & Ogden. The defendant Thomas G. Ritch, individually and as the executor and trustee of Daniel B. Fayerweather, deceased, by Messrs. Arnoux, Ritch & Woodford, his attorneys. The Trustees of Columbia College, by John McLean Nash, Esq., their attorney. Adelbert College of the Western Reserve University, by Messrs. Scott & Upson, its attorneys. Lincoln University, by Messrs. Hornblower, Byrne & Taylor, its attorneys. Park College, by Clark Brooks, its attorney. The Rectors and Visitors of the University of Virginia, by Robert C. Tay-

lor, Esq., their attorney. The Northwestern University, by Messrs. Redding & Kiddle, its attorneys. Hampton Normal and Agricultural Institute, by J. McGregor Smith, its attorney. The President and Fellows of Yale College, in New Haven and the Trustees of Rutgers College, in New Jersey, by Haley Fiske, Esq., their attorney. Barnard College, by Brownell & Lathrop, Esqs., its attorneys. John B. Reynolds and Morris B. Beardsley, as executors of the last will and testament of Lucy Fayerweather, deceased, and Mary W. Achter and Emma S. Fayerweather, by William Blaikie, Esq., their attorney.

Mt. Sinai Hospital, by Messrs. Hoadley, Lauterbach
347 & Johnson, its attorneys. The Trustees of Union
College, in the Town of Schenectady, in the State of New York, by Messrs. Chanler, Maxwell & Phillip. The President and Trustees of Bowdoin College, by Messrs. Butler, Stillman & Hubbard, its attorneys. Cornell University and Marietta College and Elmira College, by Messrs. Arnoux, Ritch & Woodford, their attorneys. Wabash College and Maryville College, by Messrs. Parsons, Shepard & Ogden, its attorneys. St. Luke's Hospital, by William Bard McVicker, its attorney. The Presbyterian Hospital, by Messrs. DeForest Bros., the said Mary W. Achter and Emma S. Fayerweather, by Roger M. Sherman, Esq., of counsel for the said William

Blaikie, Esq., and the said Roger M. Sherman, as
348 such counsel. having submitted his affidavit, dated
June , 1897, together with a copy of a bill of complaint, filed in the Circuit Court of the United States for the Southern District of New York, by the said Mary W. Achter and Emma S. Fayerweather, aud an order to show cause made by Hon. E. Henry Lacombe, Judge of that Court, on June , 1897, and upon the said affidavit and papers having asked that the making of this judgment be deferred.

NOW, THEREFORE, on motion of Messrs. Putney & Bishop, attorneys for the plaintiffs, and

IT IS ORDERED, ADJUDGED AND DECREED—

I.—That the report of the said Referee be and hereby is in all things confirmed, except as the same is corrected by paragraphs 4 and 6 of this decree, and all exceptions not allowed by such corrections are overruled.

II.—And it is further adjudged and decreed that the funds and property of the estate of Daniel B. Fayerweather in the hands of the defendants Ritch, Bulkley and Vaughan, as executors of the last will and testament and codicils of Daniel B. Fayerweather, deceased, and as residuary legatees under the will and codicil of the said Daniel B. Fayerweather at the date of the filing of
349 said report, consisted of

Cash	$2,031,493 71
Bonds and mortgages	1,044,912 99
Unsold inventoried property as shown in Schedule B of said account	12,750 00

and the leasehold and freehold property which is set forth in Schedule E of said account.

III.—And it is further adjudged and decreed:

That the defendants Ritch, Bulkley and Vaughan distribute the funds and property now remaining in their hands as executors of the last will and testament and codicils of Daniel B. Fayweather, deceased, and as trustees of the residuary estate of the said Daniel B. Fayerweather, as follows:
350

(1.) That they pay the amounts unpaid on the legacies given by the eighth paragraph of said will, to wit, to St. Luke's Hospital, New York City	$1,250
Presbyterian Hospital, New York City	1,250
Manhattan Eye and Ear Infirmary. New York City	1,250
Woman's Hospital, New York City	500
Mt. Sinai Hospital, New York City	500

with interest on each of said sums from February 28, 1892, so far as the same have not been already paid.

(2). That they pay the amounts remaining unpaid on the legacies given by the ninth paragraph of said will, to wit:

	Principal	Interest to May 12, 1897.	Principal and Interest to May 12, 1897.
Bowdoin College	$4,750	$4,457 66	$9,207 66
Dartmouth College	4,750	4,445 95	9,195 95
Amherst College	4,750	4,430 34	9,180 34
Wesleyan University	4,750	4,450 63	9,200 63
Yale College	14,250	13,358 90	27,608 90
351 Columbia College	10,000	10,797 66	20,797 66
Hamilton College	5,000	5,411 35	10,411 35
The University of Rochester	5,000	5,358 91	10,358 91
Cornell University	10,000	10,779 02	20,779 02
Lafayette College	2,375	2,202 29	4,577 29
Lincoln University	4,750	4,514 85	9,264 85
The University of Virginia	4,750	4,455 31	9,205 31
Hampton University	4,750	4,441 26	9,191 26
Maryville College	4,750	4,452 97	9,202 97
Marietta College	2,375	2,226 44	4,601 44
Adelbert College	2,375	2,226 44	4,601 44
Wabash College	2,375	2,226 44	4,601 44
Park College	2,375	2,242 19	4,617 19
Williams College	4,750	4,441 26	9,191 26
Union Theological Seminary	2,500	2,703 46	5,203 46
352	$101,375	$99,623 33	$200,998 33

so far as the same have not been already paid.

(3). That they pay to Anner Amelia Reynolds the amounts of her unpaid annuity, to wit, the sum of $22,412.50, with interest from May 15th, 1897, so far as the same have not been already paid.

(4). That they pay to John B. Reynolds, as executor of Lucy Fayerweather, deceased, the sum of $4,166.67, the

balance due on account of annuity, with interest thereon from July 15th, 1892, so far as the same has not been already paid. Such interest amounting as stated in said report of the said Referee to $1,041.51.

(5). That they pay the expenses of this accounting, to wit, the Referee's fees, the stenographer's fees and the bill of Horace S. Ely & Co. for appraisal of property, so far as the same have not been already paid.

(6). That they pay the following costs and allowances as awarded by the judgment entered December 31st, 1894,

to the plaintiffs or their attorneys the sum of $2,-353 540.94.

To John B. Reynolds and Morris B. Beardsley, as executors, and Mary W. Achter, and Emma S. Fayerweather, or their attorney, the sum of $1,145.

To Northwestern University or its attorneys, the sum of $186.

To Stephen P. Nash, Esq., $1,000 as an allowance to him as counsel for donees in deed of gift.

Together with interest on each of said sums from December 31, 1894.

And the following costs and allowance awarded by the judgment entered, December 30, 1895.

To the Trustees of Amherst College or its attorneys, 354 the sum of $256.

To the Trustees of Dartmouth College or its attorneys, the sum of $60.

To Hamilton College or its attorneys, the sum of $101.71.

To the University of Rochester or its attorneys, the sum of $70.

To the President and Trustees of Williams College or its attorneys, the sum of $60.

To Wesleyan University or its attorneys, at Middletown, Conn., the sum of $60.

To the Union Theological Seminary in the City of New York or its attorneys, the sum of $60.

To Lafayette College at Easton Pa., or its attorneys, the sum of $60.

To Lincoln University or its attorneys, the sum of $69.55.

To the Rectors and Visitors of the University of Virginia or its attorneys, the sum of $60.

To the Hampton Normal and Agricultural Institute or its attorneys, the sum of $160.

To Adelbert College of the Western Reserve Institute or its attorneys, the sum of $60.

To Park College or its attorney, the sum of $60.

To the Northwestern University or its attorneys, the
355 sum of $160.90.

To Marietta College or its attorneys, the sum of $90.50.

To Bowdoin College or its attorneys, the sum of $84.40, together with interest on each of said sums from December 30, 1895.

And the following costs awarded by the judgment of the Court of Appeals, to the plaintiffs or their attorneys, the sum of $552.90.

The Lincoln College or its attorneys, the sum of $162.80.

To Bowdoin College or its attorneys, the sum of $90.

To the Methodist Episcopal Hospital or its attorneys, the sum of $90.

356 To the Northwestern University or its attorneys, the sum of $271.35.

To Trinity College or its attorneys, $90.

To Wells College or its attorneys, $90.

To the Shattuck School or its attorneys, $90.

To the University of Pennsylvania or its attorneys, $90.

To the President and Fellows of Yale College or its attorneys, $90.

To the Trustees of Columbia College or its attorneys, the sum of $90.

To the President and Fellows of Harvard University and Vassar College or their attorneys, $90.

To the Manhattan Eye and Ear Hospital or its attorneys, $90.

To Princeton College or its attorneys, $90.

To St. Luke's Hospital or its attorneys, $90.

To the New York Eye and Ear Hospital or its attorneys. $90.

To the Presbyterian Hospital or its attorneys, $90.

To the University of the City of New York or its attorneys, $90.

To the Woman's Hospital or its attorneys, $90.

To the New York Cancer Hospital or its attorneys, $90.

To the Rectors and Visitors of the University of Vir-
357 ginia or its attorneys, $90.

Adelbert College of the Western Reserve University or its attorneys $90.

To Lafayette College or its attorneys, $90.

To Wesleyan University or its attorneys, $90.

To Park College or its attorneys, $90.

To the Union Theological Seminary or its attorneys, $90.

To the Mt. Sinai Hospital or its attorneys, $90.

To the Montefiore Home or its attorneys, $90.

To the Manhattan Dispensary or its attorneys, $98.05.

To the Barnard College or its attorneys, $385.75.

To Anner Amelia Reynofds or her attorneys, $90.

To Cornell University or its attorneys, $90.
358 To the Hampton Normal and Agricultural Institute or its attorneys, $90.

To the St. Vincent's Hospital or its attorneys, $90.

To John B. Reynolds, as executor of Lucy Fayerweather , deceased, Mary W. Achter and Emma S. Fayerwaather or their attorneys, $801.

To Wabash College or its attorneys, $90.

To Maryville College or its attorneys, $90.

IV.—And it is further adjudged and decreed, that out of the residuary estate in the hands of the said defendants Ritch, Bulkley and Vaughan they pay over to the Knickerbocker Trust Company of the City of New York, either

in cash or mortgages as above stated, the sum of $125,000, to be received by said Trust Company upon the following trusts, to wit: to invest the same and to pay over the income thereof to the extent of $4,000 per annum to Anner Amelia Reynolds during the term of her natural life in semi-annual payments, and upon her death to distribute the said sum and the income which may have accumulated thereon equally between the institutions named in the ninth paragraph of the will of said Daniel B. Fayerweather, share and share alike. Should the income be insufficient to pay the said $4,000, then the deficiency is
to be made up out of the principal.
359

V.—It is further adjudged and decreed that the said Ritch, Bulkley and Vaughan expend the sum of $25,000, or so much thereof as may be necessary in repairs to the tomb of Daniel B. Fayerweather, in Woodlawn Cemetery, and that they pay to the Woodlawn Cemetery Association out of said sum $2,000 as a fund for the repair of said tomb and the care of the cemetery lot in the future, and that they execute such release, quitclaim or conveyance as may be necessary and proper to transfer the interest in said cemetery lot to Lucy J. Beardsley in trust for herself and the heirs and next of kin of the said Daniel B. Fayerweather.

VI.—And it is further adjudged and decreed that
360 out of the balance of the said cash in the hands of
the said defendants Ritch, Bulkley and Vaughan they pay to the Northwestern University the sum of $100,000, together with interest thereon at the rate of 5 per cent. per annum from November 15, 1891, up to the date of payment, as its just and equitable proportion of the income, earnings and interest accrued upon the residuary estate as between it and the institutions named in ninth clause of the will, and that the same be paid within ten days after service of a copy of this decree upon said Ritch, Bulkley and Vaughan, or their attorneys, such payment to be made at the office of the Estate, No. 38 Park Row, in the City of New York.

VII.—And it is further adjudged and decreed that the balance of the said cash in the hands of the said defendants Ritch, Bulkley and Vaughan be distributed by them at the same office within ten days after service of a copy of this judgment ratably, as follows: One-twentieth part thereof to the plaintiff Trustees of Amherst College; one-twentieth part therof to the plaintiff Trustees of Hamilton College; one-twentieth part thereof to the plaintiff the President and Trustees of Williams College; one-twentieth part thereof to the plaintiff the Trustees of Dartmouth College; one-twentieth part thereof to the plaintiff The University of Rochester, and one-twentieth part
361 thereof to each of the defendants named in the ninth article of the said will, to wit: the President and Trustees of Bowdoin College, Wesleyan University, the President and Fellows of Yale College, the Trustees of Columbia College in the City of New York, the Union Theological Seminary in the City of New York, Cornell University, Lafayette College, Lincoln University, the Rectors and Visitors of the University of Virginia, the Hampton Normal and Agricultural Institution, Maryville College, Marietta College, the Adelbert College of the Western Reserve University, Wabash College and Park College.

362 VIII.—And it is further adjudged and decreed that the defendants Ritch, Bulkley and Vaughan, as such executors and individually, as the case may be, do proceed with all reasonable dispatch to sell and convert the unsold personal property set forth in Schedule B of their account and the leasehold and freehold property set forth in Schedule E of their account, and that they collect and get in the mortgages set forth and referred to in the account of the Referee, being the mortgages uncollected and outstanding at the date of the filing of the said report or sell or otherwise convert them into money, and after payment of any further commissions they may be entitled to and any further charges and expenses, including taxes, incurred or to be incurred by the executors

since the filing of their said account to the close of their administration, that they pay over the same to the institutions mentioned in the ninth paragraph of the will, being the institutions named in the fifth paragraph of the judgment hereinbefore entered and in the sixth paragraph of this judgment, share and share alike, such distribution to be made whenever and as often as the funds in the hands of the said Ritch, Bulkley and Vaughan shall amount to $100,000 or upwards.

IX.—It is further adjudged and decreed, that upon payment being made by the said Ritch, Bulkley and
363 Vaughan of the various sums hereinbefore directed to be paid by them in the manner hereinbefore provided, the said Ritch, Bulkley and Vaughan, from and after the making of the said payments, be and they are hereby discharged from all obligation to each of the parties to this action respecting the moneys so paid, and from any obligation to account for the same.

X.—And it is further adjudged and decreed, that any party to this action may at any time hereafter apply at the foot of this judgment for such other or further order or direction as may be necessary to carry out the provisions of this judgment, or to give full effect to the same or to compel or to permit the said Ritch, Bulkley
364 and Vaughan to account for their proceedings subsequent to the filing of the said account.

Enter.

R. A. P.,

J. S. C.

Exhibit 14.

GENTLEMEN:—You will please take notice that the foregoing is a copy of the final judgment entered this day in the above-entitled action in the office of the Clerk of the City and County of New York, in the County Court House, in said city.

Dated New York, July 6, 1897.

Yours &c.,

PUTNEY & BISHOP,

Plaintiff's Attorneys.

Directed to all the attorneys in said action.

Exhibit 15.

WILL OF OCTOBER 6TH, 1884.

IN THE NAME OF GOD, AMEN:

I, DANIEL B. FAYERWEATHER, of the City, County and State of New York, being of sound and disposing mind, memory and understanding, and mindful of the uncertainty of life, do make, publish and declare this to be my last Will and Testament, in manner and form following, to wit:

First.—I hereby revoke all wills and papers testamentary by me at any time heretofore made.

Second.—I order and direct that all my just debts and funeral expenses and the costs and charges attending the proof and execution of this my will be fully paid out of my estate by my executors hereinafter named, as soon after my decease as the same conveniently may be.

Third.—I give and bequeath unto my beloved wife, Lucy Fayerweather, the sum of Ten thousand dollars, to be paid to her as soon as my Executors shall qualify.

Fourth.—I give, devise and bequeath unto my said wife my house and lot known as Number Eleven East Fifty-seventh Street, in the City of New York, together with all household furniture and personal effects therein, except money and securities, also the stable known as Number 145 East Fifty-seventh Street in said city, together with the horses, carriages, harness and all other personal effects appertaining to said stable to Have and

to Hold the said real estate and personal property to herself and her heirs and assigns absolutely and forever.

Fifth.—I give and bequeath unto my Executors hereinafter named such sum as will in their judgment be sufficient to produce the net annual income of Fifteen thousand dollars, to Have and to Hold the same, in trust nevertheless, to invest and reinvest said principal sum and to keep the sum invested in United States Government Bonds, or on First Mortgage on real estate in the city of New York or Brooklyn, of at least twice the value of the amounts loaned thereon, my Executors to have full power and discretion as to the selection of such investments,
367 and to receive the income, profits and issues thereof, and to pay the same quarterly, in the discretion of my Executors, unto my said wife Lucy, for and during her natural life, to and for her sole use, benefit, maintenance and support.

The provisions of this my said Will contained for the benefit of my said wife, to be in lieu of dower and thirds in my estate.

Sixth.—I give and bequeath unto Anner Amelia Joyce, for and during her life, or so long as she remains unmarried an annuity of the sum of One thousand dollars for her sole and separate use and benefit, and I direct my Executors hereinafter named to invest such sum from
368 my estate as shall secure the payment of said annuity to said Anner, for and during her natural life, or so long as she remains unmarried, said annuity to be subject to no reductions, and the same to be paid to her in equal semi-annual payments.

Seventh.—I give and bequeath unto Lucy J. Beardsley, wife of Morris B. Beardsley, of Bridgeport, Connecticut, the sum of One hundred thousand dollars.

I give and bequeath unto Mary W. Achter and Emma S. Drury, daughters of William Fayerweather, of Muscatine, Iowa, the sum of Ten thousand dollars each.

I give and bequeath unto Charles Hennessy, porter in my store in the City of New York, the sum of One thousand dollars.

Eighth.—After the payment of the legacies and bequests hereinbefore made, I give and bequeath to the Presbyterian Hospital, located in the City of New York, the sum of Twenty-five thousand dollars.

To St. Luke's Hospital in said City, Twenty-five thousand dollars.

To the Manhattan Eye and Ear Infirmary in said City, Twenty-five thousand dollars.

369 To the Woman's Hospital in said City, Ten thousand dollars,

To Mount Sinai Hospital in said City, Ten thousand dollars.

Ninth.—Subject to the conditions and limitations in this paragraph hereinafter contained,

I give and bequeath to Bowdoin College at Brunswick, Maine, the sum of One hundred thousand dollars.

To Dartmouth College, at Hanover, New Hampshire, the sum of One hundred thousand dollars.

To Williams College, at Williamstown, Massachusetts, the sum of One hundred thousand dollars.

To Amherst College, at Amherst, Massachusetts,
370 the sum of One hundred thousand dollars.

To Wesleyan University at Middletown, Connecticut, One hundred thousand dollars.

To Yale College at New Haven, Connecticut, Three hundred thousand dollars, of which One hundred thousand dollars shall be used for the purposes of the Sheffield Scientific School connected with said College.

To Columbia College in the City of New York, Two hundred thousand dollars.

To Union Theological Seminary in the City of New York, the sum of Fifty thousand dollars as a special fund to be used as an endowment of what are known as Cadet-

ships, such use, however, being subject to the direction of the Board of Directors, of such Institution.

I also give and bequeath unto Hamilton College at Clinton, New York, One hundred thousand dollars.

To the University of Rochester, at Rochester, New York, One hundred thousand dollars.

To Cornell University at Ithaca, New York, Two hundred thousand dollars.

To Lafayette College at Easton, Pennsylvania, Fifty thousand dollars.

To Lincoln University at Lower Oxford, Pennsylvania, One hundred thousand dollars.

371 To the University of Virginia at Charlottsville, Virginia, One hundred thousand dollars.

To Hampton University at Hampton, Virginia, One hundred thousand dollars.

To Maryville College, Maryville, Tennesse, One hundred thousand dollars.

To Marietta College at Marietta, Ohio, Fifty thousand dollars.

To Adelbert College at Cleveland, Ohio, Fifty thousand dollars.

To Wabash College at Crawfordsville, Indiana, Fifty thousand dollars.

To Park College at Parkville, Missouri, Fifty thousand dollars.

372 In case the condition and circumstances of any of the institutions named in this paragraph of my Will shall be so changed that in the judgment of my Executors it is not expedient to pay over all or any of said moneys to such Institution, I authorize and empower my Executors in the exercise of their discretion to withhold or reduce the amounts herein directed to be given.

If my estate shall not be sufficient to pay in full all the legacies and bequests in this my Will contained, the legacies and bequests provided for prior to this paragraph of my Will shall be first paid in full and the bequests contained in this paragraph shall be paid *pro rata*.

Tenth.—All the rest, residue and remainder of my estate, real and personal, of which I shall die possessed, I give, devise and bequeath unto my Executors, to Have and to Hold the same, in trust, nevertheless, to sell and to convert into cash, and to divide the same equally among the several corporations mentioned in the Ninth paragraph of my Will, share and share alike.

Eleventh.—I hereby nominate, constitute and appoint my friends Justus L. Bulkley, merchant, and Thomas G. Ritch, lawyer of the City of New York, Executors of this my Will, and Trustees of my estate, and I authorize
373 and empower them to sell and convey any and all of my estate real and personal, (except the real estate specifically devised to my said wife), in their discretion, at such times, in such manner, and on such terms and conditions as they may deem best to make, execute and deliver any and all papers necessary and proper for the conveyances thereof, and to do any and all acts in their discretion expedient or necessary to the full execution of the provisions of this my Will. And I further order and direct that no bonds or other security of any kind be required of them either as Executors or Trustees.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my seal this Sixth day of Oc-
374 tober, in the year of our Lord one thousand eight hundred and eighty-four.

D. B. FAYERWEATHER. [SEAL].

Subscribed, sealed, published and declared by the above named Testator as and for his last Will and Testament, in the presence of us, who, at his request, in his presence and in the presence of each other have hereunto subscribed our names as witnesses the day and year last above written.
The word "paragraph" interlined before the execution hereof.

HALEY FISKE, No. 115 East 16th street, New York City.

BRADFORD W. HITCHCOCK, No. 44 West 20th street, New York City.

CHAS. L. FOSTER, 123 Hewes street, Brooklyn, New York.

375

376

Exhibit 16.

FIRST CODICIL OF 1884 WILL.

I, DANIEL B. FAYERWEATHER,, of the City of New York, do make, publish and declare this Codicil to and as a part of my Last Will and Testament which bears date and was executed on the Sixth day of October, 1884.

377 I.—I hereby ratify and confirm my said Will in every respect except so far as the same is modified by this Codicil.

II.—I hereby revoke the Tenth paragraph of my said Will which is in the words following:

"ALL the rest, residue and remainder of my estate, real and personal, of which I shall die possessed, I give, devise and bequeath unto my Executors, to Have and to Hold the same, in trust nevertheless, to sell and convert into cash and to divide the same equally among the several corporations mentioned in the Ninth paragraph of this my Will, share and share alike.

378

III.—ALL the rest and residue of my estate of whatsoever character and wheresoever situated the same may be of which I shall die possessed and remaining after the provisions of the first nine paragraphs of my Will have been fully complied with and carried into effect, I give, devise and bequeath to Justus L. Bulkley and Thomas G. Ritch named in the Eleventh paragraph of my said Will, to them and their heirs forever.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal this 13th day of December, in

the year of our Lord, one thousand eight hundred and eighty- four.

D. B. EAYERWEATHER. [SEAL].

Subscribed, sealed, published and declared by the above named Testator as and for a Codicil to his last Will and Testament, in the presence of us, who at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses, the day and year last above written.

379 STEWART L. WOODFORD, residing at 67 Cambridge Place, Brooklyn.

BRADFORD W. HITCHCOCK, 44 West 20th street, New York City.

CHARLES L. FOSTER, 128 Hewes street, Brooklyn.

380

Exhibit 17.

SECOND CODICIL OF 1884 WILL.

I, DANIEL B. FAYERWEATHER, of the City of New York, having made and executed my last Will and Testament dated October 6th, 1884, do now make, publish and declare this Second Codicil to and as a part of my said last Will.

381 *First.*—I give and bequeath to Frank B. Myrick, now in the employ of the firm of Fayerweather and Ladew, the sum of Ten Thousand dollars, and to Charles Baker and Henry Baker, also in the employ of said firm, the sum of Twenty-five hundred dollars each, and I direct that these bequests be paid prior to the payment of the bequests mentioned in the Eighth paragraph of my Will.

Second.—I hereby nominate and appoint my friend Henry B. Vaughan, of Elizabeth, New Jersey, an Executor of my Will and Trustee of my estate in addition to Justus L. Bulkley and Thomas G. Ritch, named as Executors and Trustees in my said Will, and I give to
382 said Vaughan the same powers and authority in every respect as are conferred on said Bulkley and Ritch in and by the Eleventh paragraph of my Will. I order and direct that no bonds or other security of any kind be required to be given by him as Executor or Trustee.

Third.—In all respects, except as herein modified, I ratify and confirm my said Will and the first Codicil thereto.

IN WITNESS WHEREOF, I have hereunto subscribed my

name and affixed my seal this Seventh day of January, in the year of our Lord one thousand eight hundred and eighty-eight.

D. B. FAYERWEATHER. [SEAL].

Subscribed, sealed, published and declared by the above named Testator as and for a Codicil to his last Will and Testament in the presence of us, who at his request in his presence and in the presence of each other, have hereunto subscribed our names as witnesses, the day and year last above written.

383 HALEY FISKE, residing at Summit, New Jersey.

CHAS. L. FOSTER, residing at 147 Hewes street, Brooklyn, N. Y,

DAVID F. BUTCHER, 119 Java street, Brooklyn, N. Y.

384

Exhibit 18.

THIRD CODICIL OF 1884 WILL.

I, DANIEL B. FAYERWEATHER, of the City of New York, having made and executed my last Will and Testament dated October 6th, 1884, and Codicils thereto, dated December 13th, 1884, and January 7th, 1888, do now make, publish and declare this Third Codicil to and as a part of my last Will.

385

First.—In all respects except as hereinafter modified, I ratify and confirm my said Will and the Codicils thereto.

Second.—I direct my executors to expend the sum of five thousand dollars, or so much thereof as may be necessary, in the purchase of a lot in Woodlawn Cemetery and the erection of a suitable monument.

Third.—I hereby direct that the annuity provided for Anner Amelia Joyce, by the Sixth Clause of my said Will, be increased from the sum of One thousand dollars, to Four thousand dollars, such annuity to be paid in
386 the manner and subject to the conditions set forth in said Sixth Clause of my said Will.

Fourth.—I give and bequeath to Charles M. Baker and Henry M. Baker, now in the employ of the firm of Fayerweather & Ladew, the sum of Five thousand dollars each, as hereinbefore provided, and I direct that these bequests be paid prior to the payment of the bequests mentioned in the eighth paragraph of my Will.

Fifth.—I give and bequeath to Mary W. Achter and

Emma S. Drury, daughters of William Fayerweather of Muscatine, Iowa, the sum of Twenty thousand dollars each, instead of Ten thousand dollars each, as provided in the Seventh paragraph of my Will, and I direct that these bequests be paid prior to the payment of the bequests mentioned in the Eighth paragraph of my Will.

Sixth.—I give and bequeath to E. H. Hertzman, cashier in the employ of the firm of Fayerweather & Ladew, the sum of Five thousand dollars; to Frank H. Sellman, of Brooklyn, N. Y., the sum of Three thousand dollars; to the wife of George L. Miller, of Brooklyn, N. Y., the
387 sum of Two thousand dollars; to my coachman, Benjamin Dietz, the sum of Five hundred dollars; to my servant, Mary J. Quinn, the sum of Three hundred dollars; to my servant, Kate Quinn, the sum of One hundred dollars; to Patrick Keefe and Thomas Donahue, both of New York, the sum of Three hundred dollars each; and to Owen Keefe the sum of One hundred dollars. I direct that these bequests be paid prior to the payment of the bequests mentioned in the Eighth paragraph of my Will. The bequests to servants named in this paragraph are payable only if in my employ at the time of my death.

In testimony whereof, I have hereunto subscribed my name and affixed my seal this 19th day of March,
388 in the year of our Lord one thousand eight hundred and eighty-nine.

D. B. Fayerweather. [seal.]

Subscribed, sealed, published and declared by the above-named Testator as and for a Third Codicil to his last will and Testament in presence of us, who, at his request, in his presence and in the presence of each other have hereunto subscribed our names as witnesses, the day and year last above written.
The words interlined at the end of the Sixth paragraph of this Codicil were inserted before execution.

MAUS R. VEDDER, 670 Madison Avenue, N. Y.
REYNOLDS W. WILCOX, 1050 Lexington Avenue, N. Y.
M. LOUISE BEARDSLEY, Long Hill, Conn.

389

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Exhibit 19.

FOURTH CODICIL OF 1884 WILL.

I, DANIEL B. FAYERWEATHER, of the City of New York, having made and executed my last Will and Testament dated October Sixth, 1884, and Codicils thereto dated December Thirteenth, 1884, January Seventh, 1888, and March Nineteenth, 1889, do hereby make, pub-
391 lish and declare this fourth Codicil to and as a part of my said last Will.

First.—In all respects, except as hereinafter modified, I ratify and confirm my said Will and the Codicils thereto.

Second.—I hereby confirm the revocation of the Tenth paragraph of my said Will.

Third.—I hereby amend and change the third paragraph of the Codicil dated and made December Thirteenth, 1884, so as to read as follows:

392 ALL the rest and residue of my estate, of whatsoever character, and wheresoever situated the same may be of which I shall die possessed and remaining after all the specific legacies in my said Will and the several codicils thereto have been paid, and all the provisions of said Will and codicils have been fully complied with and carried into effect, I give, devise and bequeath to Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, to them and their heirs forever.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal this fifteenth day of November, one thousand eight hundred and ninety.

D. B. FAYERWEATHER. [SEAL].

Subscribed, sealed, published and declared by the above-named Testator as and for a codicil to his last Will and Testament, in the presence of us, who, at his request, in his presence and in the presence of each other, have hereunto subscribed out names as witnesses, the day and year last above written.

ELIZABETH R. JOYCE, residing at 353 Whalley avenue, New Haven, Ct.

J. PRENTISS BROWNING, residing at 80 Clinton place, New York City.

EDWD. MARSHALL GROUT, residing at 860 Carroll
393 street, Brooklyn.

394

Exhibit 20.

DEED OF GIFT.

KNOW ALL MEN BY THESE PRESENTS, That we Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, residuary devisees and legatees under the will, meaning thereby the original will and the subsequent codicils of Daniel B. Fayerweather, late of the City of New York, deceased, prompted by our determination that we will
395 not retain for our own use any part of the residuary estate left to us by his will, and by the desire to make such disposition of his said residuary estate as in our judgment will best honor his memory, do dispose of so much of the same as shall remain after the payment of all lawful fees, expenses and charges as follows:

First.—We reserve the power to make, and we retain the right to assent to any enlargement of the fifteen thousand dollars a year by the will left to Mrs. Fayerweather, which she may desire.

Second.—We reserve the power to make, and we retain the right to assent to any enlargement of the provi-
396 sions made by the will for Mrs. Mary W. Achter and Mrs. Emma S. Drury, in case we shall be satisfied that such enlargement would not be against the wishes of Mr. Fayerweather.

Third.—We give to Lucy J. Beardsley, wife of Morris B. Beardsley, $100,000.

We do this because of Mr. Fayerweather's letter written to Mr. Vaughan and Mr. F. B. Myrick. If accepted, this gift is in discharge of any claim under that letter.

Fourth.—We give to Miss Anner Amelia Joyce one thousand dollars.

To Miss Anner Amelia Joyce, the annuity of $4,000 provided by the will, for the period of her life, instead of for the period mentioned in the will.

To E. M. Upham an annuity of $1,000 for the period of his life.

To provide for such annuities we may either retain an amount for investment, the income of which will, in our judgment, provide for the annuities, or we shall be at liberty by the use of a sum in gross to purchase an annuity from a responsible life insurance company to be selected by us.

397 *Fifth.*—We give to George H. Blake, $1,000;
F. Gould, $500;
James Campbell, $500;
H. J. Stone, $500;
John E. Carpenter, $250;
John Dixon, $500;
John C. Baylor, $200;
Kate Quinn, $100,
being the legacy to her of that amount left by the will and which has elapsed;

Albertine B. Hertzman, widow of E. H. Hertzman, $5,000, being the same amount as was left to him by the will:

Frank H. Sellman, $2,000 in addition to the $3,000
398 given by the will;

Clara Miller, wife of George L. Miller, $3,000 in addition to the $2,000 given by the will;

Patrick Keefe, $200 in addition to the $300 given by the will;

Thomas Donohue, $200 in addition to the $300 given by the will;

Owen Keefe, $200 in addition to the $100 given by the will;

The Northwestern University at Evanston, Illinois, $100,000;

Joseph Rogers, $500.

Sixth.—The said annuities shall commence from Mr.

Fayerweather's death. All the amounts heretofore mentioned shall draw interest from the expiration of one year from Mr. Fayerweather's death.

In the event that the said residuary estate shall be insufficient to pay the above amount in full they shall abate ratably.

Seventh.—After payment in full as aforesaid we give to Mount Sinai Hospital, $15,000 in addition to the amount given by the will.

The Presbyterian Hospital in the City of New York, $25,000 in addition to the amount given by the will.

399 The Woman's Hospital in the State of New York, $200,000 in addition to the amount given by the will.

The Manhattan Eye and Ear Hospital, $25,000, in addition to the amount given by the will.

The New York Eye and Ear Infirmary, $25,000.

The Manhattan Dispensary, at Tenth avenue and One hundred and thirty-first street, New York City, $25,000.

The Montefiore Home for Chronic Invalids, $25,000.

The Methodist Hospital of Brooklyn, $25,000.

St. Luke's Hospital in the City of New York, $25,000 in addition to the amount given by the will.

New York Cancer Hospital $25,000.

The Society of St. Vincent de Paul, in the City of New York, $50,000.

400 All without interest.

In the event that the said residue of the residuary estate shall be insufficient to pay the above amounts in full, they shall abate ratably.

Each of the gifts mentioned in this article is to be used for the endowment of beds or some other use which in the judgment of the officers of the institution is best fitted both to be of the greatest service, and at the same time best to perpetuate Mr. Fayerweather's memory.

Eighth.—After payment in full as above we give to Union College, of Schenectady, $100,000.

Haverford College, at Haverford College Post Office, Montgomery County, Pa., $50,000.

The University of the City of New York, $100,000.

The University of Pennsylvania, $50,000.

Brown University, at Providence, R. I., $50,000.

Harvard College, at Cambridge, Mass., $100,000.

Wesleyan University, at Middletown, Conn., $50,000, in addition to the amount given in the will.

Princeton College, $100,000.

Rutgers College, at New Brunswick, N. J., $100,000.

Wells College, at Aurora, $50,000.

Elmira Female College, $50,000.

401 Vassar College, of Pougkeepsie, $50,000.

Barnard School for Women, in the City of New York, $100,000.

The Cooper Union for the Advancement of Science and Art, as a permanent fund, the income to be used so far as necessary for the support of the Woman's Art School, $200,000.

Shattuck School, at Fairibult, Minnesota, $25,000.

Lafayette College, at Easton, Pa., $50,000, in addition to the amount given by the will.

Maryville College, $50,000, in addition to the amount given by the will.

402 Trinity College, at Hartford, Conn., $50,000.

Wabash College, $50,000, in addition to the amount given by the will.

Marietta College, $50,000, in addition to the amount given by the will.

All without interest.

The amount in each case to be used as the Fayerweather fund in some distinctive manner for the erection of buildings, the establishment of scholarship or other use, which in the judgment of the authorities will be of the greatest practical benefit; the mode of use to be subject to our approval.

A separate account of the funds to be kept by each in-

stitution and in the report of said institution the account to be separately stated.

To Yale College at New Haven, Conn., $150,000, without interest, in addition to the amount by the will, to be used in the erection of a Fayerweather building, the purpose of the building and its plan to be subject to our approval; but if in the opinion of the authorities of the college such building may be impracticable, the fund is to be used for the general purpose of the college.

In the event that the residue of the residuary estate shall be insufficient to pay the above amounts in full, they shall abate ratably.

403

Ninth.—All the rest, residue and remainder of such residuary estate, after payment in full as above, we give in equal parts, as follows:

To Yale College, at New Haven, Conn., one part.

To Columbia College, in the City of New York, one part.

To Harvard College, at Cambridge, Mass., one part.

To Princeton College, one part.

To Woman's Hospital in the State of New York, five parts.

To the Presbyterian Hospital, in the City of New York, one part.

404

The gift of this instrument made to the Woman's Hospital being for the purpose of erecting or aiding the erection of a building to be called the Fayerweather Pavilion of the Woman's Hospital, and until used for that purpose shall be kept as an invested fund, the income to be used in providing the benefits of the hospital to women who, in the whole or in part, are unable themselves to meet the expense.

Tenth.—The foregoing gifts are subject to our powers as executors, to our rights of executors, devisees and legatees to turn the general estate into money, to the pay-

ment out of the general estate of the collateral inheritance tax, or any other tax provided by law; and are subject further to our rights in the event of any question of identification or designation of either of the foregoing donees to determine the same.

We execute this instrument, recognizing that there is pending a contest in proceedings for the probate of Mr. Fayerweather's will, and recognizing further that if such contest shall not prevail, a question may be made about our legal rights as devisees and legatees.

We assume no responsibility for the result of such contest, or of any such question, or for the acts or omis-
405 sions of each other, or for the amount of or title to any of said residuary estate. Our object is each for himself to give away whatever may come to us as residuary devisees and legatees under Fayerweather's will.

This instrument is to have only that effect.

To make the same as effectual as we can, we deliver this instrument to Stephen P. Nash, Esq., of the City of New York, and Hon. Henry Stoddard, of New Haven, Conn., to hold for the said donees.

In witness whereof, we have hereunto set our hands and seals, and we, the said Henry Stoddard and Stephen P. Nash, in evidence of our acceptance of delivery of said instrument, have subscribed our names the 24th
406 day of February, 1891.

(Signed) Justus L. Bulkley, [seal].
Thomas G. Ritch, [seal].
H. B. Vaughan, [seal].

In presence of
John E. Parsons,
Haley Fisek.

Know all men by these presents:

That I, Henry B. Vaughan, one of the parties to the foregoing instrument, in consideration thereof and of the intention and purpose of the instrument, do declare, that

notwithstanding the will of Mr. Fayerweather, I leave myself debtor to his estate in the sum of five hundred thousand dollars, loaned by Mr. Fayerweather to me. That is to say, I bind myself to pay that loan, according to the terms thereof, without any deduction or difference by reason of the provision for me contained in his will.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the 24th day of February, in the year one thousand eight hundred and ninety-one.

(Signed) HENRY B. VAUGHAN. [SEAL].

407 In presence of

JNO. E. PARSONS,
HALEY FISKE.

408

Exhibit 21.

EXECUTORS' AGREEMENT WITH MRS. FAYERWEATHER AS TO THE TOMB OF MR. FAYERWEATHER, ETC.

WHEREAS, WE, the undersigned, Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, residuary
409 devisees and legatees under the Will, meaning thereby the original Will and subsequent Codicils of Daniel B. Fayerweather, late of the City of New York, deceased, did under our hands and seals on the 24th day of February, 1891, execute a deed of gift disposing of the residuary estate left to us by the said Will, and in and by said deed reserved the power to make, and retained the right to assent to any enlargement of the Fifteen thousand dollars given by the Will to Mrs. Fayerweather which she might desire, and also reserved the power to make, and retained the right to assent to any enlargement of the provisions made by the Will for Mrs. Mary W. Achter and Mrs. Emma S. Drury, in case we should be satisfied that such enlargement would not be
410 against the wishes of Mr. Fayerweather; and

WHEREAS, a desire has been expressed to us by Mrs. Fayerweather for the enlargement hereinafter made of the amount left to her by the will as aforesaid; and

WHEREAS, we have become satisfied that it would be the wish of Mr. Fayerweather to make the enlargement hereinafter provided of the provision by the said Will for Mrs. Achter and Mrs. Drury aforesaid; now

KNOW ALL MEN BY THESE PRESENTS, That under the

power, authority and rights reserved and retained by the deed of gift, aforesaid.

First.—We hereby give

1. To the wife of the said Daniel B. Fayerweather, deceased, the capital sum of Two hundred and twenty-five thousand dollars, bearing interest from April 4th, 1891, upon any part thereof unpaid to be at her absolute disposal and also to increase her annuity of fifteen thousand dollars a year so long as she shall live, to the sum of twenty-five thousand dollars for the period of her
411 life; and we also agree to execute to her a deed of the lot in Woodlawn Cemetery, intended for the interment of the remains of Mr. Fayerweather.

2. To Mrs. Mary W. Achter, the sum of Forty-two thousand five hundred dollars, bearing interest from April 4th, 1891, upon any part thereof then unpaid.

Second.—And inasmuch, as the reservation and retaining of the powers and rights to make the foregoing gifts, were, in the said deed of gift executed on the twenty-fourth day of February, 1891, hereinbefore mentioned, made the First and Second paragraphs thereof; we hereby declare that the payments hereinbefore provided for
412 shall have precedence over the gifts mentioned in the Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth paragraphs of said deed of gift.

Third.—The foregoing gifts are made subject to the provisions of the Tenth paragraph of the deed of gift executed on the twenty-fourth day of February, 1891, hereinbefore mentioned.

In witness whereof, we have hereunto set our hands and seals, and delivered this instrument to Henry Stoddard and Stephen P. Nash, mentioned in the deed of gift aforesaid this fifth day of March, 1891.

(Executed in triplicate)

JUSTUS L. BULKLEY, [SEAL].
THOMAS G. RITCH, [SEAL].
H. B. VAUGHAN. [SEAL].

We accept the foregoing instrument under the provision of the First and Second paragraphs of the deed of gift therein mentioned, heretofore accepted by us.

HENRY STODDARD,
S. P. NASH.

Dated New York, March 5th, 1891.

413

414

Exhibit 22.

AGREEMENT TO RELEASE.

In consideration of the instrument of even date herewith executed by Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, residuary devisees and legatees under the Will, meaning thereby the original Will and
subsequent Codicils of Daniel B. Fayerweather, late
415 of the City of New York, deceased, and of its deliv-
ery to Henry Stoddard and Stephen P. Nash. We, the undersigned, being the widow and all the next of kin of the said Daniel B. Fayerweather, do hereby severally agree for ourselves our, and each of our heirs, executors and administrators, as follows:

I.—All objections to the probate of the Will and four Codicils of the late Daniel B. Fayerweather, offered for probate to the Surrogate of the County of New York, are hereby withdrawn, and we consent to the probate of the same.

II.—No suit shall hereafter be brought for the con-
416 struction of the said Will and Codicils or either of
them, or to set aside the Will and Codicils or either of them and we further agree not to make any claim upon the said Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan or either of them, or against their heirs or personal representatives or either against them, the said Bulkley, Ritch and Vaughan, Executors, or as residuary legatees other than for amounts left to us by the Will and Codicils aforesaid and the deed of gift executed by the said Bulkley, Ritch and Vaughan on the twenty-fourth day of February, 1891, and the instrument dated on the fifth day of March, 1891.

III.—Upon the payment to the undersigned respectively of all the several amounts mentioned in said deed of gift and said instrument, we will severally execute a general release of all claims except those arising under the Will and Codicils both to the Executors and to the donees mentioned in the Deed of Gift dated on the twenty-fourth day of February, 1891, and to the said Bulkley, Ritch and Vaughan, individually.

In witness whereof, we have hereunto set our hands and seals this 5th day of March, 1891.

Lucy Fayerweather, [seal].

417 Lucy J. Beardsley, by Morris B. Beardsley, her attorney in fact, [seal].

Mary W. Achter, by Morris B. Beardsley, her attorney in fact. [seal].

Emma S. Drury, by Morris B. Beardsley, her attorney in fact. [seal].

418

Exhibit 23.

RELEASE BY LUCY FAYERWEATHER.

TO ALL TO WHOM THESE PRESENTS SHALL COME OR MAY CONCERN, GREETING:

Know Ye, that I, Lucy Fayerweather, widow of Daniel B. Fayerweather, of the City of New York, for and in consideration of the sum of Two hundred and twenty-five thousand dollars, lawful money of the United States
419 to me in hand paid by Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan as Executors and Trustees under the last Will and Testament of Daniel B. Fayerweather, deceased, and individually and as the representatives of the persons or corporations hereinafter named, forming a class known as donees under the deed of gift executed by the said Bulkley, Ritch and Vaughan on February 24th, 1891, which sum is in compromise and full settlement of any and all contest on my part of the Will of said Daniel B. Fayerweather, deceased, or concerning his estate, have remised, released and forever discharged, and by these presents do for myself, and for my heirs, administrators and executors, remise, release and discharge, the said Justus L. Bulkley, Thomas G.
420 Ritch and Henry B. Vaughan, as Executors and Trustees aforesaid, as individuals and as representatives of the said donees constituting a class, and also the said donees, to wit, the persons and corporations mentioned in a certain deed of gift duly delivered made by Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan on the 24th day of February, 1891, which deed of gift was introduced in evidence in the probate proceedings of the last Will and Testament of Daniel B. Fayerweather, deceased, and marked "Exhibit No. 7, contestants," and which said deed of gift is hereby made a part

of this release in order that the persons constituting said class of donees and to whom this release runs may be more fully known, and also the legal successors, assigns, heirs, executors and administrators of all the aforesaid persons and corporations, of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, claims and demands whatsoever in law or in equity which against the said persons or corporations, or any of them, I ever had or now have, or which I or my heirs, executors or administrators hereafter shall, can or may have for, upon or by reason of any matter, cause or thing whatsoever except my claim for
421 the annuity given me by the Will and Codicils thereto by the said Daniel B. Fayerweather, deceased, and also my claim for the increased annuity mentioned in the agreement dated March 5th, 1891, and made pursuant to the deed of gift above referred to.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 12th day of June, in the year one thousand eight hundred and ninety-one.

LUCY FAYERWEATHER.

Sealed and delivered in the presence of

ROBERT J. SMACK.

422 STATE OF NEW YORK, City and County of New York, } ss.:

One the 13th day of June, 1891, before me personally came Lucy Fayerweather, known to me to be the individual described in and who executed the foregoing instrument and acknowledged that she executed the same.

ROBERT J. SMACK,

Notary Public,

Kings County.

Certificate filed in New York County.

Exhibits "J" and "K" are substantial duplicates of Exhibit "I," except that the name Mary W. Achter in Exhibit "J" and the name Emma S. Fayerweather in Exhibit "K," are substituted for the name Lucy Fayerweather in Exhibit "I."

The releases of Lucy J. Beardsley, Mary W. Achter and Emma S. Fayerweather are substantial duplicates of Exhibit No. 23. (See full text Supreme Court Record pages 351 and 353).

423

424

Exhibit 24.

WILL OF 1880.

In the Name of God, Amen:

I, Daniel B. Fayerweather, of the City, County and State of New York, being of sound and disposing mind,
memory and understanding, and mindful of the un-
425 certainty of this life, do made, publish and declare
this to be my last will and testament, in manner and form following, to wit:

First.—I hereby revoke all wills and papers testamentary by me at any time heretofore made.

Second.—I order and direct that all my just debts and funeral expenses and the costs and charges attending the proof and execution of this my will be fully paid, out of my estate, by my executors, hereinafter named, as soon after my decease as the same conveniently may be.

Third.—I give, devise and bequeath unto my beloved
426 wife, Lucy Fayerweather, my house and lot on East
Fifty-seventh street, in the City of New York, known by number Eleven, and in which I now reside, together with all household furniture and personal effects therein, to have and to hold the same to herself and her heirs and assigns absolutely and forever.

Fourth.—I give, devise and bequeath unto my executors hereinafter named the sum of Three hundred thousand dollars ($300,000) to have and hold the same in Trust nevertheless, to invest and reinvest, to keep the said principal sum invested in United States Government

Bonds, or, on first mortgage on real estate in the City of New York, in the City of Brooklyn, of at least double the value of the amounts loaned thereon, my executors to have full power and discretion as to selection of such investments, and to receive the income, issues and profits thereof, and to pay the same semi-annually in the discretion of my executors, unto my said wife, Lucy, for and during her natural life, to and for her sole use, benefit, maintenance and support. The provisions (in this my will contained) for my said wife to be in lieu of dower and thirds in my estate.

I give and bequeath unto Anna Amelia Joyce, for
427 and during her life, an annuity of the sum of Eight hundred dollars ($800) for her sole and separate use and benefit, and I direct my Executors hereinafter named to invest such sum from my personal estate as shall secure the payment of said annuity to the said Anna for and during her natural life, subject to no deductions and the same to be paid to her in equal semi-annual payments.

Fifth.—I give and bequeath unto Charles Hennessey, porter in my store in the City of New York, the sum of One thousand dollars ($1,000). I give and bequeath unto Edward M. Upham, of Orange, New Jersey, book-keeper
in my said store in the City of New York, the sum
428 of Five thousand dollars ($5,000). I give and bequeath unto Rev. Levi S. Weed, of the City of New Haven, Connecticut, the sum of Five thousand dollars ($5,000). I give and bequeath unto Lucy J. Beardsley, wife of Morris B. Beardsley of Bridgeport Connecticut, her heirs and assigns, the sum of Twenty-five thousand dollars, ($25,000) and I direct and declare that the said sum shall be for her sole and separate use and benefit, and that her receipt, notwithstanding her present or any future marriage shall be a valid and effectual discharge of the same.

Sixth.—I give, devise and bequeath unto my Execu-

tors hereinafter named, the sum of Twenty-five thousand dollars $(25,000), to have and to hold the same nevertheless, to invest and reinvest, to receive the income, issues and profits thereof, and to pay the same unto the said Lucy J. Beardsley, to and for her sole use and benefit for and during her natural life, and upon the further trust: Upon the death of the said Lucy J. Beardsley, to divide the said principle sum and all accumulations thereof unto as many equal shares as there shall be children of the said Lucy living at the time of the death of the said Lucy, and children of hers who shall have died leaving lawful issue living at the time of the death of said Lucy, the
429 lawful issue of any deceased child of the said Lucy to represent and take collectively the share which such child would have taken if then living; and on such allotment and division I give, devise and bequeath one of such equal shares to each child of the said Lucy living at the time of her death, to have and to hold the same absolutely and forever; and I do give, devise and bequeath one of such equal shares unto the lawful issue of any deceased child of the said Lucy living at the time of her death, to have and to hold the same absolutely and forever.

Seventh.—I give and bequeath unto my said Executors hereinafter named the sum of Twelve thousand dol-
430 lars ($12,000), to have and to hold the same in trust nevertheless, to invest and reinvest, to receive the income, issues and profits thereof, and to apply the same to the sole use, benefit and maintenance of Mary W. Fayerweather, daughter of William Fayerweather, late of Muscatine, Iowa, deceased, for and during her natural life, and upon the further trust: Upon the death of the said Mary to divide the said principal sum and all accumulation thereof into as many equal shares as there may be children of the said Mary living at the time of her death and children of the said Mary who may have died leaving lawful issue living at the time of the death of the said Mary, the lawful issue of any deceased child of the said

Mary to represent and take collectively the share which such child would have taken if then living; and on such division and allotment I do hereby give, devise and bequeath one of such equal shares to each child of the said Mary living at the time of her death, to have and to hold the same absolutely and forever; and I do give, devise and bequeath one of such equal shares unto the lawful issue of any deceased child of the said Mary living at the time of her death, to have and to hold the same absolutely and forever.

231 *Eighth.*—I give, devise and bequeath unto my said Executors hereinafter named the sum of Twelve thousand dollars ($12,000), to have and to hold the same In Trust nevertheless to invest and reinvest, to receive the income, issues and profits thereof, and apply the same to the sole use, benefit and maintenance of Emily Fayerweather, daughter of William Fayerweather, late of Muscatine, Iowa, deceased, for and during her natural life, and upon the further trust: Upon the death of the said Emily to divide the said principal sum and all accumulation thereof unto as many equal shares as there may be children of the said Emily living at the time of her death, and children of the said Emily who may have died leaving lawful issue living at the time of the death of
232 said Emily, the lawful issue of any deceased child of the said Emily to represent and take collectively the share which such child would have taken if then living; and on such division and allotment I do hereby give, devise and bequeath one of such equal shares to each child of the said Emily living at the time of her death, to have and to hold the same absolutely and forever; and I do give, devise and bequeath one of such equal shares unto the lawful issue of any deceased child of the said Emily living at the time of her death, the same absolutely and forever.

Ninth.—I give and bequeath unto Yale College at New Haven, Connecticut, Two hundred thousand dollars.

I give and bequeath unto Cornell University, at Ithaca, in the State of New York, Two hundred thousand dollars; I give and bequeath unto Wesleyan University, at Middletown, Connecticut, One hundred thousand dollars; unto Trinity College at Hartford, Connecticut, the sum of One hundred thousand dollars; unto Dartmouth College, at Hanover, N. H., the sum of One hundred thousand dollars; unto Williams College, at Williamstown, Mass., the sum of One hundred thousand dollars; unto Amherst College, Amherst, Mass., the sum of One hundred thousand dollars; unto Hampton University of Virginia, the
sum of One hundred thousand dollars; unto Lincoln
433 University in the State of Pennsylvania, the sum of
One hundred thousand dollars; unto the University of Virginia, the sum of One hundred thousand dollars; unto the University of Rochester, located at Rochester, New York, the sum of One hundred thousand dollars; unto the Randolph and Macon College, at Boydton, Mecklenburg County, Virginia, the sum of One hundred thousand dollars; unto Columbia College, at the City of New York, the sum of One hundred thousand dollars; unto Union College, at Schenectady, New York, the sum of One hundred thousand dollars.

And I order and direct my Executors to pay said legacies to said College and University Corporations to their
proper officers or trustees, in the discretion of my Ex-
434 ecutors, as soon after my decease as in their judgment the same properly can be.

Tenth.—All the rest, residue and remainder of my estate, real and personal, I give, devise and bequeath unto said Executors, to have and to hold the same, in trust nevertheless, to sell and convert into cash and to divide the same equally among the several college and university corporations hereinbefore mentioned, share and share alike.

Eleventh.—I hereby nominate, constitute and appoint my said wife, Lucy, the said Edward M. Upham, of

Orange, New Jersey, Justus L. Bulkley, Merchant of the City of New York, and Joshua M. Fiero, lawyer, of the City of New York, or such of them as shall qualify, executors of this, my will and trustees of my estate.

And I authorize and empower them to sell and convey any and all of my estate, real and personal (except the real estate specifically devised to my said wife), in their discretion, at such times and in such manner and on such terms and conditions as they may deem best; to make, execute and deliver any and all necessary and proper papers for the sale and conveyance thereof, and to do any and all things in their discretion expedient or neces-
435 sary to the full execution of the provisions of this my will; I order and direct that no bonds or other security of any kind be required of them or either of them either as Executors or Trustees.

In Testimony Whereof, I have hereunto set my hand and seal this second day of October, A. D., 1880

D. B. Fayerweather. [seal].

The foregoing instrument, consisting of eleven pages was, at the date thereof, signed, sealed, published, acknowledged and declared by the above-named testator to be his last will and testament in the presence of each
436 of us, who, at his request, and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses thereto, the said 2d day of Oct.

Rufus T. Griggs,
No. 34 Tompkins Place,
Brooklyn, N. Y.

Thomas West Peyton,
No. 114 Fourth Avenue,
New York City.

Exhibit 25.

Mr. Ritch

Dear Sir—

The names of My Brothers Daughters are Mary W. Achter Wife of Henry B. Achter and Emma S. Drury wife of Dudley Drury of Muscatine, Iowa

You may make my wife yearly allowance $15,000 instead of $12,000 and perhaps Mrs. Beardsley $100,000 instead of $50,000. Yours truly

437 D. B. Fayerwrather

N B I presume this would go to her children in case of her death

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Exhibit 26.

"Wife house and fur stable and contents 145 East 57th and income of $12,000 a year Amelia Jy. $1,000 a year so long as she remains single

Lucy J. Beardsley $50,000

10,000 each to Wills children

	200,000		
	200,000		1,000
438	100,000		50
	100,000		20
	100,000		71,000
	100,000		1,000
	100,000		
		2	
	100,000		
	100,000		
	100,000		
	100,000		
	100,000		2,500
	1,400,000		

Exhibit No. C
Proponents.

Exhibit 27.

"NEW YORK, October 6, 1884.

This certifies that I have executed my will of this date, having been advised by my counsel of the provision and restrictions of the law of this State relative to benevolent corporations.

I trust my heirs will permit the provision of this my will to be carried iuto effect.

D. B. FAYERWEATHER."

439

Exhibit 28,

"NEW YORK, December 11, 1884.

PRIVATE MEMORANDUM.

I have made Messrs Bulkley and Ritch my residuary legatees in the confidence that thereby my intentions as expressed in my will shall be carried into effect, and without litigations on the part of any person or persons interested.

In case of my death I trust that they will take such steps, by will or otherwise, as will protect my estate against the contingency of the death of either before
440 my estate is settled and distributed.

D. B. FAYERWEATHER."

Exhibit 29.

"PRIVATE MEMORANDUM.

Having made enquiries with regard to Hampton and Lincoln Universities, it is my judgment that the bequests to them should be withheld.

I think the bequest to Cornell University should not exceed $100,000.

By the terms of the will Cornell University had $200,000.

"If the Northwestern University at Evanston, Illinois, is in a prosperous condition, I would recommend that $100,000 be given to it.

If the following persons are in my employ at the time of my death I suggest that they receive the following sums:

Rogers and Blake, $500 each. Gould, Campbell and Stone, $300 each, and Carpenter $250; also James, who now opens and closes the store, $100. John Dixon, $200.

I also wish that $1,000 be given Miss Joyce immedi-
441 ately after my decease by addition to the provision made for her in my will.

March 22nd, 1889.

D. B. FAYERWEATHER."

442

Exhibit 3o.

"11 East 57th Street, November 3rd, 1890.

MR. THOMAS G. RITCH,

Dear Sir—Will you, when next coming this way, kindly bring the balance of the copy of my will.

Yours very truly,

Dictated. D. B. FAYERWEATHER."

The envelope contains:

"MR. THOMAS G. RITCH.
18 Wall Street,
"New York City."

Exhibit 31.

11 East 57th Street,
November 13, 1890.

My Dear Mr. Ritch:

Will you please deliver to Mr. Henry B. Vaughan my original will and the first, second and third codicils thereto, which have been kept in your possession, as I wish to examine them with him in connection with the copies which you have furnished me.

Yours truly,
D. B. Fayerweather.

443

Exhibit 32.

"Hall & Vaughan,
Hides & Leather,
18 Ferry St., N. Y.

November 13th, 1890.

Dear Miss Joyce:

Will you please explain to Mr. Fayerweather that I have obtained the letters from Mr. Ritch. At first Mr. Ritch stated that he would take the papers to Mr.
444 Fayerweather, but I reminded him that the letter read to give them to me, and he said he would do it. He grew, however, as white as the paper upon which I am writing.

I will deliver the second letter to-morrow. There is, however, but little use in this, and I am convinced from his manner that Mr. Ritch knew exactly what he was doing.

Yours truly,
Hall & Vaughan."

To which was attached the following postscript:

"I will see him Saturday morning."

Exhibit 33.

"11 East Fifty-seventh Street, N. Y. City,
November 13, 1890.

Mr. Thomas Ritch:

Dear Sir:—I have examined my original will and the first, second and third codicils thereto, handed by you to Mr. Vaughan at my request.

By the tenth article of my will I left my residuary estate to my executors in trust to be equally divided among certain corporations and institutions.

By the first codicil, it seems that I revoked this tenth article of my will, and then made the following dis-
445 position of my residuary estate:

'III: All the rest and residue of my estate, of whatsoever character, and wheresoever situated the same may be, of which I shall die possessed and remaining after the provisions of the first nine paragraphs of my will have been fully complied with and carried into effect, I give, devise and bequeath to Justus L. Bulkley and Thomas G. Ritch, named in the eleventh paragraph of my said will, to them and their heirs forever.'

Please advise me at once in writing what is the legal effect of this clause, and to whom and how would my residuary estate go in case of my death, supposing this
446 first codicil to remain in force.

Yours truly,

D. B. Fayerweather"

Exhibit 33*a*.

"NEW YORK, November 13th, 1890.

My Dear Miss JOYCE—I have had two long talks with Mr. Vaughan to day and yesterday, and I fear Mr. Fayerweather is worrying over his business matters. Mr. Vaughan says that Mr. F. is too ill to be seen, and so I would be glad to have you say to him, if you think it well, that I will execute any paper or say anything in your presence, or in that of any one else that will
447 enable him to feel that his wishes will be—" partly written and erased, what seem to be the letters compl, as if the writer had started to write complied with and changed it—" carried out to the letter. It would be a misfortune indeed to me to lose his confidence after so many years, through any misunderstanding now. The will and codicils provide carefully for the institutions in which he was interested and for the relatives and friends to whom he was attached, and I know that at the time the papers were drawn, the reasons for each paragraph were considered and approved by him, the object being to prevent any contests.

I write thus freely to you, because you have known of Mr. Fayerweather's affairs, and I believe that you,
448 as well as he, believe that I have only tried to do my duty.

If at any time you or Mr. F. would like to see me, I will call.

Sincerely yours,

THOS. G. RITCH."

Exhibit 34

"ARNOUX, RITCH & WOODFORD,
WILLIAM H. ARNOUX,
THOMAS G. RITCH,
STEWART L. WOOFORD,
HALEY FISKE,
C. N. BOVEE, Jr.,
WILLIAM C. WALLACE.

449 18 WALL STREET, NEW YORK,
November 14th, 1890.

D. B. FAYERWEATHER, Esq.:

Dear Sir,—The intention of the change in question was to enable Messrs. Bulkley and myself to carry out the intentions of the will as modified by the various private memoranda in my posesession. Neither Mr. Bulkley nor myself would have any moral right to treat any portion of your estate otherwise than as we know would conform to your wishes. I suggest that I call on you with these, and if still approved by you, that they be left in a sealed package with Miss Joyce, or anyone named by you. The legal effect of the clause in question is to vest the title to the residuary estate in Messrs. Bulkley and myself,
450 but as I have said, neither Mr. Bulkley nor I would wish to derive any personal benefit under the codicil.

Yours truly,

THOS. G. RITCH."

Exhibit 35.

"11 East Fifty-seventh Street,
November 15, 1890.

Mr. H. B. VAUGHAN and Mr. F. B. MYRICK:

Gentlemen—

In addition to the sums already disposed of by you, I wish you to give a further sum of about $100,000 in securities now in my box, of which Mr. Myrick has the key—

The securities taken at their value of the day—to my
451 niece Lucy J., wife of Morris B. Beardsley. This letter will be sufficient authority for so doing.

Truly yours,

D. B. FAYERWEATHER."

Exhibit 36.

PARSONS, SHEPARD & OGDEN,
Trinity Building, 111 Broadway,
NEW YORK, February 14, 1491.

F. R. COUDERT, Esq.

Dear Mr. COUDERT:

452 Referring to my talk a few days since with you *re* Fayerweather, permit me to say, the charge having been made that Messrs. Bulkley, Ritch and Vaughan propose to retain for their personal purposes Mr. Fayerweather's residuary estate, that it is not so; and that to set at rest any doubts upon the subject, they are ready now or at any time to make such disposition of it as in their judgment will best honor Mr. Fayerweather's memory. If Mrs. Fayerweather has wishes in this regard, or if she knows of objects she thinks Mr. Fayerweather would have favored, they would be glad to be informed of it.

Another subject may well be put at rest. It has been asserted that the provision for Mrs. Fayerweather is inadequate. What Mr. Fayerweather's wishes were you know by his own handwriting. If, however, $15,000 a year is inadequate, Messrs. Bulkley, Ritch and Vaughan are satisfied that it would not be against Mr. Fayerweather's wishes that it should be increased; and it is their wish to increase it to any adequate amount. I speak directly for Mr. Bulkley and Mr. Vaughan. Mr. Ritch, I feel sure, will concur.

Yours truly,

JNO. E. PARSONS.

453

Exhibit 37.

SURROGATE'S COURT,

COUNTY OF NEW YORK.

IN THE MATTER
OF
The Probate of the Last Will and Testament and Codicils of DANIEL B. FAYERWEATHER, deceased,
454

It is hereby consented that all the objections to the will and codicils of Daniel B. Fayerweather heretofore filed by Lucy Fayerweather, widow of decedent, be and the same are hereby withdrawn, and that an order to that effect be entered without notice.

Dated N. Y., March 12, 1891.

COUDERT BROTHERS,
Attorneys for Lucy Fayerweather.

Exhibit 38.

SURROGATE'S COURT,

NEW YORK COUNTY.

IN THE MATTER

455 OF

The probate of the Last Will and Testament and Codicils of DANIEL B. FAYERWEATHER, deceased.

It is hereby consented that all the objections to the will and codicils of Daniel B. Fayerweather, heretofore filed by the heirs at law and next of kin of said decedent, be and the same are hereby withdrawn, and that an order to that effect be entered without notice.

456 Dated N. Y., March 13, 1891.

DANIEL G. ROLLINS,

Attorney for all the heirs at law and next of kin.

Exhibit 39.

"At a Surrogate's Court, held in and for the County of New York, at the County Court House in the City of New York, on the 16th day of March, in the year one thousand eight hundred and ninety-one.

Present—Hon. RASTUS S. RANSOM, Surrogate.

IN THE MATTER
457 OF
The Probate of Papers propounded as the last Will and Testament and Codicils thereto of DANIEL B. FAYERWEATHER, deceased.

On reading and filing the annexed consent of Lucy Fayerweather by her attorneys, Coudert Brothers, dated March 12th, 1891, that all the objections heretofore made by her to the probate of the papers propounded as
458 the last Will and Testament of Daniel B. Fayerweather, deceased, be withdrawn.

Now, on motion of Arnoux, Ritch & Woodford, attorneys for proponents, it is hereby

Ordered, that the said objections be, and the same hereby are, withdrawn.

RASTUS S. RANSOM,

Surrogate."

Exhibit. 40.

DECREE ADMITTING WILL TO PROBATE.

At a Surrogate's Court, held in and for the City and County of New York, at the County Court House in said City on the 25th day of February, 1891.

459 *Present*—Hon. RASTUS S. RANSOM, Surrogate.

IN THE MATTER
OF
The Probate of the last Will and Testament of Daniel B. Fayerweather, deceased.

460

Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan having heretofore and on the 5th day of December, 1890, appeared herein by Arnoux, Ritch & Woodford, their attorneys, and applied to the Surrogate of the County of New York, to whom jurisdiction in that behalf belonged to have the last will and testament of Daniel B. Fayerweather, late of the City of New York, deceased, dated the 6th day of October, 1884, and four several codicils thereto, dated respectively as follows: the first codicil the 13th day of December, 1884, the second codicil the 7th day of January, 1888, the third codicil the 19th day

of March, 1889, and the fourth codicil the 15th day of November, 1890, duly admitted to probate as the last will and testament of said Daniel B. Fayerweather, deceased;

And Lucy Fayerweather, the widow of said Daniel B. Fayerweather, deceased, and Lucy J. Beardsley, Mary W. Achter and Emma S. Fayerweather, nieces of said Daniel B. Fayerweather, deceased, and his only heirs at law and next of kin, having duly waived issue and service of a citation herein and having duly consented to the probate of said will and codicils as the last will and testament of said Daniel B. Fayerweather, deceased;

461 And the said Lucy Fayerweather having thereafter and on or about the 11th day of December, 1890, appeared herein by Coudert Bros., Esqrs., her attorneys, and having duly presented her petition to said Surrogate for leave to withdraw her said consent and to be permitted to file objections to said will and codicils, upon which an order was duly entered granting said petition, and thereafter and on or about the 17th day of December, 1890, said Lucy Fayerweather filed objections to the probate of each and all of said instruments; and on or about the 17th day of January, 1891, the said next of kin having appeared herein by Daniel G. Rollins, Esq., their attorney, and having duly presented their petitions to said Surrogate for leave to withdraw their said consents

462 and to be permitted to file objections to said will and codicils, upon which an order was duly entered granting said petition, and thereafter and on or about the 21st day of January, 1891, said next of kin filed objections to the probate of each and all of said codicils but not to said original will; and subsequently Amherst College, a legatee, under said will, having appeared by Jerome & Nason, Esqrs., its attorneys; Bowdoin College, a legatee, by Butler, Stillman & Hubbard, Esqrs., its attorneys; The Hampton Institute, a legatee, by Austin Abbott, Esqr., its attorney; Williams College, a legatee, by Bangs, Stetson, Tracey & McVeigh, Esqrs., its attorneys; Hamilton College, a legatee, by Root & Clarke, Esqrs., its attorneys;

Dartmouth College, a legatee, by Horace Russell, Esqr., its attorney; Maryville College and Wabash College, legatees, by Parsons, Shepard & Ogden, Esqrs., their attorneys; Mount Sinai Hospital, a legatee, by Hoadley, Lauterbach & Johnson, Esqrs., its attorneys; Yale College, a legatee, by Henry Stoddard, Esqr., its attorney; St. Luke's Hospital, a legatee, by Miller, Peckham & Dixon, Esqrs., its attorneys; Rector and Visitors of the University of Virginia, a legatee, by Robert C. Taylor, Esqr., their attorney; Wesleyan College, a legatee, by George C. Reynolds, Esqr., its attorney; University of Rochester, a legatee, by Martin W. Cook, Esqr., its attorney;
463 Adelbert College, a legatee, by Scott & Upson, Esqrs., its attorneys, in pursuance of orders of this Court permitting said legatees to intervene and appear herein;

And the issues raised by said objections having come on to be heard on the 2nd day of February, 1891, and the days to which the same was adjourned, William H. Arnoux, Esqr., John E. Parsons, Esqr., and Henry Stoddard, Esqr., appearing of counsel for said proponents, and Frederic R. Coudert, Daniel J. Holden and Daniel G. Rollins, Esqrs., appearing of counsel for said contestants;

And witnesses having been examined and proofs taken
464 touching the facts and circumstances attending the execution of said will and the competency of the said Daniel B. Fayerweather to execute the same as and for his last will and testament; and the said Surrogate having heard the proof and allegations of the proponents, and mature deliberation being had thereon, and the matter having been adjourned to this day.

Now, on hearing Frederic R. Coudert and Daniel G. Rollins, Esqrs., for contestants, and William H. Arnoux and John E. Parsons, Esqrs., for proponents, on the competency of the proofs more especially to sustain the first and fourth codicils above mentioned, and the Surrogate

having ruled that the proof of proponents in relation thereto be sufficient to make a *prima facie* case and to put contestants upon their proof in opposition thereto, and it being admitted in open Court by said counsel for contestants that the proofs hereinbefore given by said proponents are sufficient to sustain the said original will and that they do not intend to contest the same; and the objections thereto having been withdrawn and it satisfactorily appearing to the Surrogate that the condition and situation of said estate require that probate of the undisputed instrument should be granted at the earliest moment
practicable; and on motion of Arnoux, Ritch &
465 Woodford, attorneys for said executors;

It is ordered, adjudged and decreed, that the same instrument in writing, to wit: the instrument known as the last will and testament, dated the 6th day of October, 1884, and purporting to be the last will and testament of said Daniel B. Fayerweather, deceased, was properly executed, is genuine and valid, and that the said Daniel B. Fayerweather at the time of the execution of the said instrument was in all respects competent to execute the same, and was not under restraint or undue influence, and said instrument is admitted to probate and established as a will of real and personal property, and that the same be
recorded, and that letters testamentary issue to the
466 executors in said will named on their taking the oath
required by statute.

And it is further ordered, adjudged and decreed, that the objections to the probate of the said codicils and each of them shall be reserved for further hearing proof and disposition by said Surrogate.

RASTUS S. RANSOM,

Surrogate.

Approved as to form and substance as amended.

COUDERT BROS.,
Attorneys for Lucy Fayerweather.

DANIEL G. ROLLINS,
Attorney for heirs at Law and Next of Kin.

ARNOUX, RITCH & WOODFORD,
Attorneys for Proponents.

467

Exhibit 41.

DECREE ADMITTING CODICILS TO PROBATE.

At a Surrogate's Court held in and for the City and County of New York at the County Court House in said city, on the 24th day of March, 1891.

Present—Hon. RASTUS S. RANSOM, Surrogate.

468 IN THE MATTER OF The Probate of the Last Will and Testament of DANIEL B. FAYERWEATHER, deceased.

Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan having heretofore and on the 5th day of December, 1890, appeared herein by Arnoux, Ritch & Woodford, their attorneys, and applied to the Surrogate of the County of New York, to whom jurisdiction in that behalf belonged to have the last will and testament of Daniel B.

Fayerweather, late of the City of New York, deceased, dated the 6th day of October, 1884, and four codicils thereto, dated respectively as follows: the first codicil the 13th day of December, 1884; the second codicil the 7th day of January, 1888; the third codicil the 19th day of March, 1889, and the fourth codicil the 15th day of November, 1890, duly admitted to probate as the last will and testament of said Daniel B. Fayerweather, deceased;

And Lucy Fayerweather, the widow of said Daniel B. Fayerweather, deceased, and Lucy J. Beardsley,
469 Mary W. Achter and Emma S. Fayerweather, nieces of said Daniel B. Fayerweather, deceased, and his only heirs at law and next of kin having duly waived issue and service of a citation herein, and having duly consented to the probate of said will and codicils as the last will and testament of said Daniel B. Fayerweather, deceased.

And the said Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, having thereupon duly taken the oaths to discharge their duties as executors, as required by law;

470 And the said Lucy Fayerweather having thereafter and on or about the 11th day of December, 1890, appeared herein by Coudert Brothers, Esqrs., her attorneys, and having duly presented her petition to said Surrogate for leave to withdraw her said consent and to be permitted to file objections to said will and codicils, upon which an order was duly entered granting said petition and thereafter and on or about the 17th day of December, 1890, said Lucy Fayerweather filed objections to the probate of each and all of said instruments; and on or about the 17th day of January, 1891, the said next of kin having appeared herein by Daniel G. Rollins, Esq., their attorney, and having duly presented their petitions to

said Surrogate for leave to withdraw their said consents and to be permitted to file objections to said will and codicils, upon which an order was duly entered granting said petition, and thereafter and on or about the 21st day of January, 1891, said next of kin filed objections to the probate of each and all of said codicils, but not to said original will; and subsequently Amherst College, a legatee under said will, having appeared by Jerome & Nason, Esqrs., its attorneys; Bowdoin College, a legatee, by Butler, Stillman & Hubbard, Esqrs., its attorneys; The Hampton Institute, a legatee, by Austin Abbott, Esq., its attorney; The President and Trustees of Williams
471 College at Williamstown, Mass., a legatee, by Bangs, Stetson, Tracey & MacVeigh, Esqrs., its attorneys; Hamilton College, a legatee, by Root & Clarke, Esqrs., its attorneys; Dartmouth College, a legatee, by Horace Russell, Esq., its attorney; Maryville College and Wabash College, legatees, by Parsons, Shepard & Ogden, Esqrs., their attorneys; Mount Sinai Hospital, a legatee, by Hoadley, Lauterbach & Johnson, Esqrs., its attorneys; Yale College, a legatee, by Henry Stoddard, Esq., its attorney; St. Luke's Hospital, a legatee, by Miller, Peckham & Dixon, Esqrs., its attorneys; Rector and Visitors of the University of Virginia, a legatee, by Robert G. Taylor, Esq., their attorney; Wesleyan University, a legatee, by George G. & F. Reynolds, Esqrs., its at-
472 torneys; University of Rochester, a legatee, by Martin W. Cooke, Esq., its attorney; Adelbert College, a legatee, by Scott & Upson, Esqrs., its attorneys; Columbia College, a legatee, by John McLane Nash, Esq., its attorney in pursuance of orders of this Court permitting said legatees to intervene and appear herein;

And witnesses having been examined and proofs taken touching the facts and circumstances attending the execution of said will and codicils, and the competency of the said Daniel B. Fayerweather to execute the same as and for his last will and testament;

And the said Surrogate, after hearing the allegations

and proofs of the parties and after mature deliberation thereon, having determined that the will dated the 6th of October, 1884, ought to be admitted to probate; and the counsel for the contestants having withdrawn their objections to said will, and said will having thereupon being admitted to probate by a decree of the said Surrogate, dated the 25th day of February, 1891, as by reference thereto will more fully and at large appear;

And the several counsel for the widow and heirs at law and next of kin having thereupon obtained leave to file amended objections to the said four codicils above
473 described, and the heirs at law and next of kin, by their counsel, having in pursuance thereof, filed amended objections on or about the 25th day of February, 1891.

And additional witnesses having been examined and further proofs taken touching the facts and circumstances of the execution of said codicils and the competency of the said Daniel B. Fayerweather, deceased, to execute the same as and for codicils to his said will.

And the said Surrogate having heard the allegations and proofs of the parties in respect thereto, and having taken mature deliberation thereon, and the said heirs
474 at law and next of kin having withdrawn their said objections and amended objections, and the said widow having failed to file any amended objections pursuant to the leave granted, which the said Surrogate now holds to be withdrawn of the motion to amend, and the said widow, having withdrawn the objections heretofore filed.

And the matter of the probate of the said will and codicils having thereby come before the said Surrogate for final adjudication.

Now, on the consent of the widow and heirs at law and

next of kin, by their attorneys herein, given in open Court, and on hearing William H. Arnoux, Esq., of counsel for proponents, and on motion of Arnoux, Ritch & Woodford, attorneys for proponents herein,

The Surrogate being fully satisfied of the genuineness of the will and codicils and the validity of their execution, it is

ORDERED, ADJUDGED and DECREED that the decree of the 25th day of February, 1891, admitting the said last will of Daniel B. Fayerweather, de-
475 ceased, to probate, be and the same is hereby confirmed and made a part of this decree. It is

FURTHER ORDERED, ADJUDGED and DECREED, that the said instruments in writing to wit: the first, second, third and fourth codicils thereto, dated respectively: the first codicil the 13th day of December, 1884; the second codicil the 7th day of January, 1888; the third codicil the 19th day of March, 1889, and the fourth codicil the 15th day of November, 1890, and purporting to be the last will and testament of said Daniel B. Fayerweather, deceased, and the first, second, third, and fourth codicils thereto were and each of them was properly executed and are and each of them is genu-
476 ine and valid; and that the said Daniel B. Fayerweather, deceased, at the time of the execution of the said instruments, and of each of them was in all respects competent to execute the same and each of them and was not under restraint or undue influence; and it is

FURTHER ORDERED, ADJUDGED, and DECREED that each of said instruments above described to wit: the first, second, third and fourth codicils, be and the same hereby are admitted to probate and established together with said last will and testament of Daniel B. Fayerweather, deceased, dated the 6th of October, 1884,

as a will of real and personal property; and that the same be recorded and that letters testamentary issue to Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, executors named in said will and codicils. And it is

FURTHER ORDERED, ADJUDGED and DECREED that out of the estate of said Daniel B. Fayerweather, deceased, the costs and disbursements of the several attorneys who have appeared herein as the same have heretofore been taxed, be paid as follows:

To proponents, or Arnoux, Ritch & Woodford, their
477 attorneys, the sum of Twenty-Three Hundred Seventeen and eighteen one hundredths Dollars, as the same has been heretofore ordered to be paid.

To the Hampton Normal Institute, or to Austin Abbott, its attorney, the sum of One Hundred Fifty Dollars.

To the University of Rochester, at Rochester, New York, or to Martin W. Cooke, its attorney, the sum of One Hundred Fifty Dollars.

To Adelbert College, or to Scott & Upson, its attorneys, the sum of One Hundred Fifty Dollars.

To Bowdoin College, or to Butler, Stillman & Hubbard, its attorneys, the sum of One Hundred Fifty Dollars.

To the Rector and Visitors of the University of Vir-
ginia, or to Robert C. Taylor, its attorney, the sum
478 of One Hundred Fifty Dollars.

To Wabash and Maryville Colleges or to Parsons, Shepard & Ogden, their attorneys, the sum of One Hundred Fifty and twelve one hundredths Dollars.

To the Trustees of Columbia College or to John McLane Nash, its attorney, the sum of One Hundred Fifty Dollars.

The President and Trustees of Williams College, at Williamstown, Massachusetts, or to Bangs, Stetson, Tracy & MacVeigh, its attorneys, the sum of One Hundred Fifty Dollars.

To the Trustees of Amherst College, or to Jerome & Nason, its attorneys, the sum of One Hundred Fifty Dollars.

To Mount Sinai Hospital, or to Hoadley, Lauterbach & Johnson, its attorneys, the sum of One Hundred Fifty Dollars.

To Hamilton College, or to Root & Clarke, its attorneys, the sum of One Hundred Dollars.

To St. Luke's Hospital, or to Miller, Peckham & Dixon, its attorneys, the sum of One Hundred Fifty Dollars.

To Yale University, or to Henry Stoddard, its attorney, the sum of One Hundred Fifty Dollars.

To Wesleyan University, or to G. G. & F. Reynolds, its attorneys, the sum of One Hundred Fifty Dollars.

To Dartmouth College, or to Horace Russell, its at-
479 torney, the sum of One Hundred Dollars.

RASTUS S. RANSOM,
Surrogate.

(Original filed March 24, 1891).

Exhibit 41*a*.

PETITION FOR PROBATE OF THE WILL OF OCT. 6TH, 1884, AND CODICILS.

480 SURROGATE'S COURT.
CITY AND COUNTY OF NEW YORK.

IN THE MATTER
OF
Proving the Last Will and Testament of DANIEL B. FAYERWEATHER, deceased, as a Will of Real and Personal Property.

To the Surrogate's Court of the City and County of New York:

The petition of Justus L. Bulkley, residing at No. 787 Madison avenue, in the City of New York; Henry B. Vaughan, residing at Orange, in the State of New Jersey, and Thomas G. Ritch, residing at Stamford, in the State of Connecticut, respectfully showeth: That your petitioners are the executors named in the last will and testament of Daniel B. Fayerweather, late of the County of New York, deceased, and in the various codicils thereto.

That said last will and testament, and the four codicils thereto above mentioned relate to both real and personal property, and said will bears date the sixth day of October, 1884, and is signed at the end thereof by said
481 testator and by Haley Fiske, Bradford W. Hitchcock and Charles L. Foster, as subscribing witnesses, and the first codicil thereto bears date the 13th day of December, 1884, and is signed at the end thereof by the said testator and Stewart L. Woodford, Bradford W. Hitchcock and Charles L. Foster, as subscribing witnesses, and the second codicil thereto bears date the 7th day of January, 1888, and is signed at the end thereof by the said testator and by Haley Fiske, Charles L. Foster and David F. Butcher as subscribing witnesses, and the third codicil thereto bears date the 19th day of March, 1889, and is signed at the end thereof by the said testator and by Maus R. Vedder, Reynold W. Wilcox and M. Louise Beardsley, as subscribing witnesses, and the fourth
482 codicil thereto bears date the 15th day of November, 1890, and is signed at the end thereof by the said testator, and by Elizabeth R. Joyce, J. Prentice Browning and Edward Marshall Grout as subscribing witnesses.

That your petitioners do not know of any other codicil to said last will and testament, nor is there any other will or codicil to the best of their information and belief. That the said deceased was, at his death, a resident of the County of New York, and departed this life in said county on the 15th day of November, 1890.

Your petitioner further states that the widow and all the heirs, and all the next of kin of said deceased, together with their residences are as follows, to wit:

Lucy Fayerweatherer, the widow of the deceased, who resides at No. 11 East Fifty-seventh street, New York City; Lucy J. Beardsley, who resides at Bridgeport, in the State of Connecticut; Mary W. Achter, a niece of deceased, who resides at Muscatine, in the State of Iowa, and Emma S. Fayerweather formerly known as Emma S. Drury, who resides at Muscatine, in the State of Iowa, the said Lucy J. Beardsley, Mary W. Achter and Emma S. Fayerweather being the children and only descendants of William Fayerweather, a deceased brother of testator.

That all of the above named are of full age and of sound mind.

483 That said decedent left him surviving no child or children, no adopted child or children; the issue of any deceased child or children, or the issue of any deceased adopted child or children; or any father or mother or any deceased child's husband or wife, or brother or sister of the half or whole blood, or the issue of any deceased brother or sister or any deceased brother's wife or any deceased sister's husband except as above stated.

That no petition for the probate of said will or for letters of administration on said estate has been heretofore filed in this or any other Surrogate's Court of shis State. That each of the above named persons, to wit: Lucy Fayerweather, the widow, and Lucy J. Beardsley, Mary W.

484 Achter and Emma S. Fayerweather, the only heirs at law and next of kin of the deceased, has duly executed in writing and acknowledged her waiver of the issue and service of a citation herein, aud her consent that the above described will and four codicils thereto be forthwith admitted to probate. Your petitioners therefore pray that the said last will and testament and the said four codicils thereto may be proved as a will of real and personal property, and that letters testamentary may be issued thereon to the executors named therein who may qualify thereunder.

Dated New York City, December 5, 1890.

JUSTUS L. BULKLRY,
THOS. G. RITCH,
H. B. VAUGHAN, Petitioners.

City, County and State of New York, ss.

JUSTUS L. BULKLEY, HENRY B. VAUGHAN and THOMAS G. RITCH, the petitioners named in the foregoing petition, being duly and severally sworn, depose and say: That they have each read the foregoing petition subscribed by them and know the contents thereof; and that the same is true of their knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters they believe it to be true.

JUSTUS L. BULKLEY,
485 THOS. G. RITCH,
H. B. VAUGHAN,
Petitioners.

Sworn to this 5th day of December, A. D., 1890.
EDWARD MARSHALL GROUT,
Notary Public,
Kings County.

Cert. filed in N. Y. Co.

Exhibit 42.

DEC. 13TH, 1890, LETTER RITCH TO BEARDSLEY URGING HIM TO DISCOURAGE CONTEST BY WIDOW AND NEXT OF KIN.

"Private."

486 ARNOUX, RITCH & WOODFORD,
18 Wall Street,
NEW YORK, December 13, 1890.

Dear Judge:

In kindness to Mrs. Fayerweather and Miss Joyce they ought in some way to be informed of the existence in my possession of a prior will much less favorable to both of them than the present, and with no discretion whatever to the executors $800 per year to Miss J., and the income of $300,000 to Mrs. F. in addition to real estate.

Trust estates for life to the daughters of William Fayerweather except $25,000 to Mrs. Beardsley.

It is a delicate position for me, and so I put you in possession of this information with liberty to use it as you deem proper.

Sincerely trusting Mrs. Fayerweather may soon see the hopelessness and unwisdom of a contest with those who desire to be her friends;

I am very truly yours,

THOMAS RITCH.

487

Exhibit 43.

NOV. 28TH, 1890, LETTER RITCH TO BEARDSLEY AGAIN DISCOURAGING CONTEST

NEW YORK, November 28, 1890.

Dear Judge:

I have not yet received the waivers from Muscatine, but on Wednesday came a telegram from H. B. Achter asking for a copy of the will certified by the Clerk of the Court.

I answered that I could not get a certificate until the will was filed for probate, but that I had given you a correct copy which I understood had been sent to Iowa.

488 I hope that they will not act under bad advice and cause delay by objections which could have no other result than delay, with expense and the loss of the $1,000 each legacy tax, which for myself I would be glad to make good to them, believing that it would be Mr. Fayerweather's wish in case they deal with us as friends and not enemies. I fear that the will will not be ready for probate on Monday and as I would not wish Miss Beardsley to come to the city on an uncertainty, I suggest that she wait subject to telegram from me.

Yours truly,

THOS. G. RITCH.

Hon. MORRIS B. BEARDSLEY.

Exhibit 44.

Memorandum on back of **Ex. Oa**, of Surrogate's Record, is as follows:

CLAUSE ABOUT MISS JOYCE.

ABOUT THE MEN BEING WITH HIM:

MORE INSTITUTIONS FOR BENEFIT.

MRS. BEARDSLEY AMOUNT 100,000$ IN BONDS.

489 STRIKE OUT ABOUT SERVANTS IN HIS EMPLOY

Exhibit 45.

AGREEMENT BY COLLEGES TO POSTPONE PAYMENT OF THEIR LEGACIES TILL WIDOW AND NIECES ARE PAID.

Paper marked **Exhibit No. 45,** and read in evidence by Mr. Parsons, as follows:

490

"Whereas, a contest has been proceeding in the Court of the Surrogate of the County of New York against the probate of the last will and testament and four codicils thereto propounded by the executors of Daniel B. Fayerweather, deceased, and certain other proceedings have been threatened concerning the construction and validity of the will;

And Whereas, the undersigned are legatees named in said will, and it is to their interest to have the pending controversy settled, and the threatened controversy abandoned;

And Whereas, a settlement of all the controversies has been provisionally agreed to whereby the widow and next of kin have agreed to accept the sum of $310,000, and in consideration thereof to consent to the probate of the will and codicils as propounded.

And to release the estate of said Fayerweather from all claims except those to which the said widow and next of kin are respectively entitled by the provisions of the will and codicils aforesaid.

Now, in consideration of the foregoing, and to enable the provisions of the said settlement to be carried out, it is agreed by the undersigned that the said sum of
491 $310,000, and all expenses connected with the said litigation, be paid by the executors of the last will and testament of Daniel B. Fayerweather, deceased, prior to and in preference to the payment to the undersigned respectively, of the amounts of the legacies in the will mentioned; and that each for ourselves agree that our respective legacies shall be postponed to the payment of the amount above mentioned, and all the expenses above mentioned.

YALE COLLEGE,
By HENRY STODDARD,
Atty.

HORACE RUSSELL,
492 Atty. for Dartmouth College.

MOUNT SINAI HOSPITAL,
By HOADLEY, LAUTERBACH & JOHNSON.

HAMILTON COLLEGE,
By ROOT & CLARKE, Attys.

HENRY DAY,
Atty. for Union Theological Seminary.

MARIETTA COLLEGE,
By HALEY FISKE, Atty.

BOWDOIN COLLEGE,
By BUTLER, STILLMAN & HUBBARD
& THOS. H. HUBBARD,
Attys.

MANHATTAN EYE & EAR HOSPITAL,
103 Park Avenue.
New York City.
A. G. AGNEW,
Secretary.

HAMILTON INSTITUTE,
By AUSTIN ABBOTT.

CHARLES A. DAVISON,
For Williams College.

H. W. SAGE,
Chn. for Cornell University.

493 AMHERST COLLEGE,
By JEROME & NASON,
Attys.

LINCOLN UNIVERSITY, AT LOWER OXFORD,
PENN.,
By STUART L. WOODFORD.

WESLEYAN UNIVERSITY,
By G. G. & F. REYNOLDS.

RECTOR AND VISITORS OF THE UNIVERSITY
OF VIRGINIA,
By ROBERT C. TAYLOR.

ST. LUKE'S HOSPITAL,
494 By MILLER, PECKHAM & DIXON,
Attys.

LAFAYETTE COLLEGE,
By GEORGE L. SHEARER,
Trustee.

THE TRUSTEES of COLUMBIA COLLEGE,
By JOHN McL. NASH,
Treasurer.

PRESBYTERIAN HOSPITAL,
By DE FOREST & WEEKS,
Attys.

ADELBERT COLLEGE OF WESTERN
RESERVE UNIVERSITY,
By SCOTT & UPSON,
Attys.

Exhibit 46.

MAY 8TH, 1893, LETTER OF FIVE COLLEGES TO EXECUTORS THREATENING SUIT.

"May 8th, 1893.

Messrs. THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN, executors and residuary legatees under the will of the late DANIEL B. FAYERWEATHER:

Gentlemen,—It seems probable that the dismissal of the complaint in the case of Reynolds against Ritch, leaves that case in such a position that the colleges for which we appeared and answered therein, are precluded from presenting in that case the claims made by them in
495 their answers. Such seems to be the view taken by our counsel. We beg to advise you, however, that these colleges will insist that the residuary estate in your hands is charged with a trust in favor of the institutions named in the ninth article of the will. We would be glad of a voluntary recognition of this on your part, but failing that, some or one of the colleges interested, will presently begin an affirmative action for the purpose of procuring an adjudication by the proper court upon their rights in the residuary estate and upon the claims indicated in the answers above referred to."

Signed.

HORACE RUSSELL, for Dartmouth College.

PUTNEY & BISHOP, for Amherst College.

496 ROOT & CLARKE, for Hamilton College.

BANGS, STETSON, TRACY & MACVEAGH, for Williams College.

MARTIN W. COOKE, for University of Rochester.

Exhibit 47.

POWER OF ATTORNEY—LUCY J. BEARDSLEY TO M. B. BEARDSLEY.

"KNOW ALL MEN BY THESE PRESENTS, that whereas Daniel B. Fayerweather, late of the City of New York, deceased, by a paper heretofore propounded in the Surrogate's Court for the County of New York, as his last will and testament, did bequeath unto me, Lucy J. Beardsley, of Bridgeport, in the State of Connecticut, a certain money legacy, paid unto me; and

Whereas, as one of the heirs at law and next of kin
497 of said Daniel B. Fayerweather, deceased, I did heretofore cause objections to be filed in said Surrogate's Court to the admission to probate of certain papers propounded as codicils to said last will and testament.

Now, know ye that I, the said Lucy J. Beardsley, of Bridgeport, in the State of Connecticut, have made, ordained, constituted and appointed Morris B. Beardsley, of Bridgeport, in the State of Connecticut, my true and lawful attorney, for me and in my name and for my use and benefit, to ask, demand and receive from Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, the executors of the said Daniel B. Fayerweather, deceased, the legacy given and bequeathed to me by the said will as aforesaid, together with such additional sum as
498 my attorney shall deem satisfactory, in full settlement of any contest on my part concerning said estate, and upon receipt thereof by or payment thereof to my said attorney, a general release or discharge for the same, to make, execute and deliver, hereby ratifying and confirming and allowing whatsoever my said attorney shall lawfully do in the premises.

And I further authorize my said attorney for me and in my name to authorize the withdrawal of objections to probate heretofore filed on my behalf and to do whatsoever else may be necessary to release the estate of the said Daniel B. Fayerweather, deceased, and his executors from any and all claims for me or on my behalf.

In witness whereof, I have hereunto set my hand and seal this 13th day of March, 1891.

LUCY J. BEARDSLEY. [SEAL.]

Signed, sealed and delivered in the presence of

ALFRED B. BEERS,
LEWIS K. GOULD."

Mr. Arnoux: I now re-offer the two instruments of
499 precisely the same tenor, executed, one by Mary W. Achter and the other by Emma S. Drury, which have already been marked for identification. One is marked Exhibit 16, for identification, and the other Exhibit 17.

Mr. James: Those are the papers to which I objected on a former day of this trial, on account of their want of authentication, but I stated that the objection might be withdrawn, and I do now withdraw it.

The papers referred to are marked in evidence **Exhibits 16 and 17** of this date.

Exhibit 48.

500

WILL OF LUCY FAYERWEATHER.

I, LUCY FAYERWEATHER, widow, of the City of New York, do make, publish and declare this to be my last will and testament, in manner and form as follows:

First.—All my furniture, books, jewelry, ornaments, wearing apparel, plate, china and other articles of personal use and all the horses, carriages and harnesses of which I may be possessed at the time of my death, I give and bequeath to my sister Anner Amelia Joyce, the same to be hers absolutely.

Second.—I give and devise the premises Number Eleven East Fifty-Seventh Street, in the City of New York,

where I now reside and the premises Number One hundred and forty-five East Fifty-Seventh Street, now occupied by me as a stable, to my sister Anner Amelia Joyce, and her heirs absolutely and forever.

Third.—I give and bequeath to my sister Anner Amelia Joyce, One hundred thousand dollars, with interest from the date of the probate of my will, the same to be hers absolutely and forever, and to be paid in full before any other legacies are paid and in preference to any others.

Fourth.—Out of the residue of my estate I give and
501 bequeath the following legacies:

To my brother Charles Joyce Twenty-five thousand dollars.

To Harriet A. Joyce, wife of my brother Joseph L. Joyce, Fifteen thousand dollars.

To my brother John S. Joyce, Ten thousand dollars.

To my sister Betsy Maria French, Ten thousand dollars.

To my sister Emily Doolittle, Ten thousand dollars.

To my sister Mary Lounsberry, Ten thousand dollars, and to the issue of my brother Henry Joyce, to be divided among them in equal shares *per stirpes* Ten thousand dollars.

In case any of my brothers and sisters above named or my sister-in-law above named shall die before me leav-
502 ing issue, I direct that the issue of such brother or sister or sister-in-law shall take the legacy their his or her parent would have taken if living.

Fifth.—In case my residuary estate shall not be sufficient to pay in full the legacies mentioned in the last preceding clause of my will the said legacies shall abate proportionately.

Sixth.—Interest shall be allowed on said legacies at the rate of five per cent. per annum from the date of the probate of my will.

If any of the said legacies shall lapse or be revoked the same shall revert to and become part of my residuary estate.

Seventh.—I have recently given to my brother, Joseph L. Joyce, in money and notes, the sum of Ten thousand five hundred dollars, and for that reason make the legacy to his wife less than I should otherwise make it.

If the said money so given to my said brother shall be invested in a farm at or near Egremont, the title to which shall be in my name then I give and devise the said farm so purchased with said money to Harriet A. Joyce, wife of my said brother.

Eighth.—In case I shall make any advances to, or shall make any provision for any of the legatees mentioned
503 in this my will by gift, deed of gift, Trust deed, or otherwise, the provision so made shall be considered *pro tanto*, as an ademption of the legacy bequeathed to such person in this my will, and as on account of said legacy or in full thereof, as may appear and the receipt of the amount given under one instrument shall be deemed to be *pro tanto* in satisfaction of the provisions of both.

Ninth.—All the rest, residue and remainder of my estate real and personal and wherever situated I give, devise and bequeath to my sister Anner Amelia Joyce to be hers absolutely and forever.

504

Tenth.—I nominate, constitute and appoint my sister Anner Amelia Joyce, and Daniel J. Holden, of the City of New York, to be Executrix and Executor of this my last Will and Testament and I direct that no bond or other security be required of either of them.

Eleventh.—If any professional services shall be rendered by my said Executor or by his firm in relation to my estate, I direct that he or they shall be allowed reasonable compensation therefor in addition to any Commissions to which he may be entitled.

Twelfth.—For the purpose of making my Will effectual and conclusive upon all my heirs, legatees and next of

Kin I do hereby declare that if any of my heirs or next of Kin shall directly or indirectly institute or become an acting party to any proceeding to oppose the probate of this my Will, or to set aside, interfere with or make null any provisions of said Will, such act or proceeding shall operate and be effectual as a release of all claim on the part of such heir or next of Kin to any part of my property or estate. And any provision of my Will in favor of such heir or next of Kin or in the favor of the wife or children of such heir or next of Kin, I do hereby abrogate annul and make void. And to the same end I do declare that my heirs and next of Kin shall under no circum-
505 stances be entitled to any other or greater interest in my estate than is given in and by said Will.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal, at the City of New York, this third day of June, in the year one thousand eight hundred and ninety-one.

LUCY FAYERWEATHER. [SEAL].

Words "plate china" interlined
above seventh line, first page.

J. A. IRWIN.
MORRIS B. BEARDSLEY.
M. LOUISE BEARDSLEY.
506 ROBT. J. SMACK.
D. J. HOLDEN.

The foregoing instrument was on the day of the date thereof subscribed, sealed, published and declared by the testatrix therein named, as and for her last Will and Testament in the presence of us, who, at her request, in her presence and in the presence of each other have hereunto subscribed our names as witnesses.

J. A. IRWIN, 14 West 29th Street, New York.
MORRIS B. BEARDSLEY, Bridgeport, Conn.
M. LOUISE BEARDSLEY, Long Hill, Conn.
ROBT. J. SMACK, 84 So. 2d St., Brooklyn.
DANIEL J. HOLDEN, 28 W. 91st Str., N. Y.

The codicil is as follows:

"I, LUCY FAYERWEATHER, widow, of the City of New York, do make, publish and declare the following to be a codicil to my last Will and Testament, date June 3, 1891, in manner and form as follows:

I revoke and annul the tenth clause of my said Will, in which I appointed Anner Amelia Joyce and Daniel J. Holden, Executrix and Executor of my said Will, and in place and lieu thereof I nominate, constitute and appoint my brother-in-law, John B. Reynolds, of New York City, and Morris B. Beardsley, of Bridgeport, Conn., Ex-
507 ecutors of my said last Will and Testament, and I direct that no bond or other security be required of either of them.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal, at the City of New York this twelfth day of January, in the year one thousand eight hundred and ninety-one,

LUCY FAYERWEATHER. [SEAL].

The foregoing instrument was on the date thereof, subscribed, sealed, published and declared by the testatrix the therein named as and for a Codicil to her last will and Testament, dated June 3, 1891, in the presence of us, who at her request, in her presence, and in the pres-
508 ence of each other have hereunto subscribed our names as witnesses.

ELLEN R. CHENEY, Rutland, Vermont.
GEORGE H. CHENEY, Rutland, Vermont.
LUCY J. BEARDSLEY, Bridgeport, Conn.
MORRIS B. BEARDSLEY, Bridgeport, Conn.

Exhibit. 49.

DEPOSITION OF JOHN W. WESCOTT.

Mr. Sherman and Mr. Bovee agree that the within pages containing the testimony of J. W. Westcott, shall take the place of pages 1611 to 1627, inclusive, heretofore delivered.

JOHN W. WESTCOTT, called as a witness on behalf of
509 the complainants, being duly sworn, testified as follows:

Direct examination by Mr. Sherman:

1 Q. Are you a member of the bar of the State of New Jersey?

A. I am.

2 Q. And how long have you practiced there?

A. Since 1879, I think.

3 Q. Do you know Henry B. Vaughan?

A. I do.

4 Q. Were you counsel in a case in the Court of Chancery of the State of New Jersey wherein William L.
510 Wright was plaintiff and Henry B. Vaughan and others were defendants?

Mr. Bovee: We object on the ground that it is irrelevant and immaterial to the issues presented upon the special pleas, irrelevant and immaterial in any aspect of the case, and incompetent, that if Henry B. Vaughan was a party to such litigation the record is the best evidence.

A. I was.

5 Q. Is the decision of the Vice Chancellor in that case reported in the 51st Volume of New Jersey Equity Reports at page 475?

Mr. Bovee: Same objection, and the report is the best evidence of what that report contains.

A. Yes, sir.

6 Q. Is the opinion reported in that volume at that page the same as filed in the case?

Mr. Bovee: We object to the question as irrelevant and immaterial to the issue presented upon the special pleas, as incompetent in calling for the conclusion and opinion of the witness, and that the record of the court duly certified is the best evidence in the case, and that this record which is now offered is not properly and duly authenticated as the opinion in that case.

A. The opinion as printed in this report is the opinion in the case and is a part at least of the original
511 opinion. Whether it is exactly the original opinion as filed by Vice-Chancellor Pitney I cannot state without comparison. It is certainly the substance of his opinion.

7 Q. Do you recognize the book as an authentic, official publication wherein the lawyers of the State of New Jersey are accustomed to find the approved opinions of the court upon cases tried there?

Mr. Bovee: We object to the question as irrelevant and immaterial and incompetent and calling for the opinion and conclusion of the witness.

A. I do. That book contains the judicial utterances of the courts of New Jersey and is the source of information to the bar of the State of New Jersey as to what
512 these judicial utterances have been and are, and the opinion printed in the book is the official opinion in this case.

Mr. Bovee: We move to strike out the answer of the witness as irrelevant and immaterial and incompetent, the witness having already stated that the opinion in question is not the complete opinion of the court as filed, and therefore not the complete record.

8 Q. Was the judgment resulting upon the opinion in question affirmed by the Court of Errors and Appeals of New Jersey?

Mr. Bovee: We object to it as incompetent, the judgment of affirmance and the record of such affirmance is

the best evidence. We object to the matter as irrelevant and immaterial to the issues presented by the special pleas and as incompetent and calling for the opinion and conclusion of the witness.

A. It was.

9 Q. Is the decision of the Court of Errors and Appeals last referred to reported in the same volume at page 637?

Mr. Bovee: We object to it as incompetent, the volume is the best evidence of what that contains, and calling for the opinion and conclusion of the witness, and irrelevant and immaterial to the issues presented by the special pleas, and not the best evidence.

513 A. It is.

Mr. Sherman: I offer in evidence from the book the opinion in the Court of Chancery at page 475, the whole of the opinion, and the record at page 637 of the decisions of the Court of Errors and Appeals.

Marked Complainants' Exhibit No. for identification.

February 1st, 1901, C. B.

Mr. Bovee: Defendants object to the opinion in this case at page 475 upon the ground that it is irrelevant and immaterial to the issues raised by the special pleas, irrelevant, immaterial, and incompetent in any possible

514 aspect of this case; the parties to this action, except the defendent Henry B. Vaughan, were not parties to that action; that the alleged opinion was rendered in a controversy having no relation to the issues in this case. It is further objected that the matter is incompetent in that the opinion is not duly authenticated as the official and complete opinion of the court, and the witness having testified that such opinion is not the entire opinion of the Vice Chancellor rendered in the case. We object to the alleged record of the affirmance of the judgment at page 637, upon the ground that it is irrelevant and immaterial to the issues presented by the special pleas and irrelevant, immaterial and incompetent in any possible aspect of this

case; that it is incompetent as not being duly authenticated as the record of the court upon the affirmance of said judgment, and not the best evidence and not duly authenticated. Defendants as the examiner to certify the objections upon the matter offered in evidence to the court.

Which is done, and upon hearing before the Court the objection was sustained.

10 Q. Was there any discussion in that cause in question as to the disposition by Mr. Henry B. Vaughan of a deed to some residence property which it was alleged
515 that Mr. Vaughan had executed to the decedent, George M. Wright?

Mr. Bovee: We object to the question as incompetent, irrelevant and immaterial to the issues presented upon the special pleas, and as incompetent and inadmissible in any way to affect the interests of the parties to this litigation.

The Court sustains the objections and disallows the question, to which complainants except.

11 Q. What did Mr. Vaughan say upon that subject in your hearing?

Mr. Bovee: Defendants object upon the ground that
516 it is irrelevant and immaterial and incompetent in any possible aspect of this case, irrelevant and immaterial to the issues presented by the special pleas, and calling for the opinion and the conclusion of the witness as to what Mr. Vaughan testified to.

The Court sustains the objections.

To which complainants except.

12 Q. Did Mr. Vaughan give testimony upon the subject as to whether the title to Colonel Wright's house was in him or was in Colonel Wright's heirs?

Mr. Bovee: We make the same objection as before, and we make the further objection that the question is im-

proper and leading, and we ask the Examiner to certify the objection to the court.

The Court sustains the objection.

To which complainants except.

13 Q. Do you remember whether Mr. Vaughan in his answer made any claim to ownership of that residence?

Mr. Bovee: We object to it as irrelevant and immaterial to the issues presented upon the special pleas; we object to it as incompetent and that the answer itself is the best evidence of what it contains; as calling for the opinion and the conclusion of the witness; and we ask
517 the Examiner to certify our objection to the court.

The Court sustains the objection.

To which complainants except.

14 Q. How did the question of ownership of that residence become a question in the cause?

Mr. Bovee: We object to it as irrelevant and immaterial to the issues presented under the special pleas, incompetent, calling for the opinion of the witness, his conclusions and not facts, and that the record in that cause is the best evidence.

The Court sustains the objection.

To which complainants except.

518 Mr. Bovee: No cross examination.

Signing of the deposition by the witness waived

Exhibit 50.

OPINION OF PITNEY, V. C., OF NEW JERSEY.

The opinion marked Complainants' Exhibit for identification is as follows:

PITNEY, V. C.

The complainant is one of the children of George M. Wright, late of Bordentown, in the County of Burling-

ton. He died on the 7th day of January, 1885, intestate, leaving his widow and five children him surviving. The five children are the complainant, the defendants Lucy M. Vaughan, Mary J. Hedges, Ray S. Wright and George W. A. Wright, and his widow is Jane M. Wright, who took out letters of administration upon his estate.

On the 17th of December, 1886, nearly two years after his father's death, and before any settlement of his estate, the complainant conveyed and assigned to the defendant William W. Gibbs, by deed of that date, all his right, title and interest in the estate, real and personal,
of which his father died seized or possessed, in con-
519 sideration of the sum of $250, and by deed dated the
22d of July, 1887, Gibbs conveyed the same to the defendant Henry B. Vaughan.

The object of the bill is to set aside those conveyances and to invest the complainant with his original right in his share of the estate, and for an account of the personal estate of the decedent, and payment to the complainant of his share thereof. Other matters of relief are specially prayed for, not necessary now to be stated.

The admitted facts with regard to the conveyance by by the complainant to Gibbs, and by Gibbs to Vaughan, are that complainant, some time before the 17th of December, had an interview with Gibbs, who lived and had
his office in Philadelphia, in which he expressed a
520 willingness to sell his interest in the estate; that
Gibbs reported that interview to Vaughan, and that Vaughan told Gibbs he (Vaughan) was willing to purchase it if he could get it at a price not exceeding $500; that afterwards Gibbs had another interview with the complainant, when he made the purchase for $250, which he paid him in cash; that he (Gibbs) immediately drew upon Vaughan for that amount, with $100 added for his services, and Vaughan honored the draft, and that the complainant was not aware, at the time of the sale, that Vaughan was the real purchaser.

The ground upon which complainant founded his claim in his bill is therein set out substantially as follows:

That the complainant, at and before the date of the transfer, was in indigent and straitened circumstances, not on good terms with his family, and was living separate from them, and that they, the defendants, knew that he was in needy circumstances, and conspired together to defraud him of his interest in his father's estate, and that they fraudulently concealed from the complainant the property and assets of the estate, and falsely represented to him that said estate was insolvent, and that his interest therein was worthless, and that he would never realize anything therefrom, and that on the 17th day of December, the date of the transfer, he, relying upon these
521 false and fraudulent representations, and verily believing them to be true, and being assured by the defendants that his interest in the estate could in no event exceed in value the sum of $250, and that an assignment of his interest would greatly facilitate the settlement thereof, executed the assignment to Gibbs, who was acting for the defendants.

The bill further alleges that the defendants, when they made the representations to the complainant, knew that his share and interest in the estate was worth $25,000. The bill alleges that Vaughan, the husband of the complainant's sister, was the real purchaser of the complainant's interest. The bill then alleges the suppression of the assets of the estate by the administratrix, with
522 the aid of the other defendants, mentioning one hundred and ninety-seven shares of stock of the Star Rubber Company, of the value of $15,000; thirty shares of the stock of the United Railroad Companies of New Jersey, of the value of $6,840, and that these shares were transferred, by virtue of a power of attorney obtained from the decedent on his death-bed, to a third party without consideration, and kept from the inventory, but afterwards distributed among the defendants; that the inventory was fraudulent and defective in that it did not include the shares of stock of the Star Rubber Company before mentioned, and the stock of the United Companies of New Jersey before mentioned, and, in addition thereto,

seventy-nine shares of the stock of the Bordentown Banking Company, of the value of $16,000; a note of William Bradley, of the value of $600, and a note of one Flanagan, of the value of $9,500, and other property not mentioned; and there is a general allegation that the estate was not insolvent, but solvent and worth a large sum of money.

All of the defendants except Gibbs have joined in an answer, in which they admit that they knew of the complainant's indigent and needy circumstances, but say that they were brought on by his dissipation and irregular habits; they deny that they conspired to defraud
523 him or concealed from him the property and assets of the estate, or that they falsely represented to him that the estate was insolvent and his interest worthless; allege that he was fully aware of the amount and situation of the estate, and that he knew that G. M. Wright, at the time of his death, was in debt to the amount of over $265,000, and that his estate of every kind and character, as appraised, amounted to $39,000, was entirely inadequate to the payment of his debts; and they charge that complainant was aware of all that was done in the way of making the inventory and in suppressing the assets; and they allege that the complainant himself sought out William W. Gibbs, who was a large creditor of the estate of George M. Wright, and urged him to
524 buy out his share at the sum mentioned, and in so doing he was not influenced or induced thereby by any assurances or representations made by any of the defendants.

The defendant Henry B. Vaughan, answering for himself as a part of the joint answer, says:

"That the purchase of the so-called interest of said complainant in said estate of said George M. Wright was made by said William W. Gibbs *without the procurement of this defendant or his previous knowledge of his purpose so to do.* And said interest so purchased was afterwards assigned by said Gibbs to this defendant

at the price or value of $350, as one of the claims against said estate, of which said Gibbs had become the owner, and which he sold and transferred to this defendant on the———day of———"

The defendants last named, further answering, jointly allege that the transfer of the shares of the Star Rubber Company was made by virtue of a valid power of attorney executed by George M. Wright on the 6th day of January, the day before he died, and that the one hundred and ninety-seven shares of stock were, by virtue thereof, sold and transferred to one J. Warren Coul-
525 ston, and such transfer was known to the complainant. They say that of the shares of the United Companies, nineteen were pledged for the payment of a debt and the other eleven were duly inventoried. They say that the shares of Star Rubber stock were properly excluded from *the inventory because they were sold in good faith and that the same is true of the seventy-nine shares of the Bordentown Banking Company, they having been transferred to Henry B. Vaughan for a full consideration paid by him;* and that as to the Flanigan note, it was not inventoried because it was supposed to have been fully paid till it was subsequently discovered that a small balance was due by Flanigan on said note.

They allege that the estate of George M. Wright was
526 largely insolvent and that condition was well known to the complainant; and they say that at the time of the transfer by the complainant to Gibbs, said interest of complainant had no intrinsic value whatever, because of the utter insolvency of his father's estate; and they set up a final account by Mrs. Wright as administratrix, in the orphans' court of Burlington County, passed May 23d, 1888, in which she has fully accounted for the estate.

Gibbs, by his separate answer, denies that, in taking the assignment, he was acting for said other defendants, and that the sum of $250 paid by him for said complainant's share was an unconscionable price, and he "avers

the truth to be that, at the time of the death of said George M. Wright, he was a large creditor of his estate and interested in obtaining a prompt settlement thereof; that he was approached by said complainant and solicited to purchase his interest as one of the heirs and next of kin of said George M. Wright, and was told by said complainant that there had been a fraudulent concealment by said other defendants, or some of them, of the assets of said George M. Wright, and that complainant's principal object in making the statement proposing to sell his interest, so far as the defendant could understand, was to excite the defendant's suspicions and arouse his
527 anger, and so induce the defendant to pay him something for his *information; and that the defendant was then interested in carrying through to completion the Pennsylvania, Slatington and New England railroad, a large amount of whose bonds, the property of said railroad company, were pledged as collateral for notes of said George M. Wright, and the release and possession of which bonds it was very important, at that time, for the defendant to secure;* and to enable him to do so, as well as obtain an adjustment of his own claims and of a large number of other claims against said estate then owned by defendant, it was important for this defendant to have a speedy settlement of said estate; that the hostility then displayed by complainant to any
528 settlement, and his threats of legal proceedings to hinder and delay it, prompted this defendant to buy him off and take a transfer of his interest at the price of two hundred and fifty dollars, a sum named by said complainant, and then entirely satisfactory to him, although more than the intrinsic value of any interest which he then had in said estate, so far as this defendant was able to ascertain."

And he then proceeds to say—

"*That said purchase was made by this defendant for himself, and not for said Henry B. Vaughan, to whom this defendant afterwards sold said interest* for the

sum of $350, together with the other claims against said estate owned by this defendant."

It will be observed that the admitted facts as above stated with regard to the conveyance by the complainant to Gibbs, and by Gibbs to Vaughan, directly contradict a part of the allegations of the answers, but are insufficient, standing by themselves, to establish the complainant's case. That depends upon several matters of fact, which may be stated thus:

First: What was the actual situation of the estate
529 as to solvency or insolvency at the date of the transfer?

Second: What was the complainant's understanding and knowledge in that behalf?

Third: What was the understanding and knowledge of Gibbs and Vaughan upon that subject? and

Fourth: What representations, if any, were made by Gibbs to complainant at and before the execution of the transfer?

530 I will consider these in their order.

First: The decedent was a man of considerable means, and at the time of his death was possessed of a considerable amount of property. He owned several houses and lots in Bordentown, the value of which was not given, but one of them, his homestead, the title of which stood in Vaughan, was of considerable value. The inventory of his personal estate amounted to $39,000. In addition to that were the several items of what may be called the "suppressed assets," which are mentioned in the complainant's bill, and which, if they had been added to the inventory, would have swelled it to nearly $80,000, with-

out counting $73,000 of railroad bonds presently to be mentioned. To this should be added the value of the real estate. And, in point of fact, the allegations of the bill with regard to the suppression of the Star Rubber stock and other assets are true, and the allegations of the answer in that behalf are false. The rubber stock was actually transferred to Mr. Coulston to keep it away from the creditors, and was afterwards distributed among the next of kin, excepting the complainant. So with seventy-nine shares of the stock of the Bordentown Banking Company, transferred to Mr. Vaughan by virtue of a power of attorney executed by Mr. Wright on his death-bed.
531 Those shares were afterwards distributed among the next of kin.

The assets which should be added to the inventory, which foots up $39,000, are as follows:

Flanigan note	$9,500
Bradley note	600
One hundred and ninety-seven shares of stock of Star Rubber Company, per value $50, taken at the appraisment of one hundred and three other shares on the inventory	9,850
Seventy-nine shares of the Bordentown Banking Company, taken at the appraisment of other shares valued in the inventory at
532 $150	11,850
Nineteen shares of railroad stock pledged with bank in Jersey City, the margin on which produced	1,837
Note of Gibbs	3,471
Total of assets (not including railroad bonds) to be added to inventory	$37,108

The decedent, however, at the time of his death, was very heavily involved by reason of pecuniary engagements arising out of his attempt to build the Pennsylvania,

Slatington and New England railroad across the northern part of the State of New Jersey.

(Here follows a discussion of facts, which is omitted).

Well may the complainant put the question to the defendants, If the estate was then insolvent, when, how and by what means, and by the operation of what causes, did it become solvent? Solvent it certainly did become. What change took place after the period of the transfer from Wright to Gibbs? The fact is, that no change in the estate occurred, and that the settlement was ac-
533 tually made on the very state of things then existing.

Second. The next question is, What was complainant's knowledge and information as to the situation of the estate?

It is plain that he knew all, or nearly all, about what are called the "suppressed assets"—excepting of course the $73,000 of railroad bonds, as to which there is no proof. His letters to his mother prove this, and he told Gibbs, as he swears, all about them at the first interwiew. There is, however, not the least proof or reason to be-
lieve or suspect that he had any information what-
534 ever as to the then true condition of the estate, with all its complications as it is now developed. He certainly was entirely ignorant of the fact that Gibbs, who controlled a majority of the claims against the estate, was willing to deliver up his batch of them and guarantee the estate against the remainder upon being paid the comparatively trifling sum of $20,000. The evidence is clear that complainant believed the estate was insolvent, and he was willing for a small sum to sell to a creditor information by which the latter could increase his dividend in the estate.

Third. On the other hand, Gibbs and Vaughan, as

early at least as December 9th, 1886, (the date of Mr. Gray's letter), knew the estate was not insolvent, but could be settled and leave a handsome surplus to be divided among the next of kin.

(Discussion of facts omitted).

Lastly. What representations were made by Gibbs and Vaughan, or either of them, to Wright on this subject?

Let Gibbs speak for himself. He was called by the
535 defendants. After stating that he had acquired Wright's interest in December, 1886, the direct examination proceeded as follows:

"Q. How did negotiations open between you and him relative to your acquiring that interest?

"A. Mr. Wright called at my office and requested the privilege of seeing me; I had never seen him before or heard of him; and he presented the situation.

"Q. What did he state with relation to the situation?

"A. He stated to me he had understood that I held large obligations against the estate, and that it had been represented to me that the estate was insolvent; that he had positive information to the contrary; that there
536 had been a great deal of property that belonged to the estate concealed and that the estate was of very much larger value than it had been represented to me, or had been shown by the inventory, of which I had a copy; that he had had more or less of trouble with them at home, and they were disposed to ignore his relationship, or something to that effect, and that he had made up his mind to offer me the purchase of his interest in the estate, which he thought would help me to get a very much larger sum out of the claims I held againt the estate than I would otherwise be able to get; I asked Mr. Wright, then, for a specific statement as to what property had been concealed or what additional value there was to the

estate beyond what was shown by the inventory, of which I had a copy, *and he named certain things which added to what was on the inventory, still left the estate very largely insolvent, and I so stated to him;* he finally stated to me that he needed some money, and he would be willing to sell me his interest in it, which he thought would help me anyhow to some extent in the matter, and offered it to me for $500; I told Mr. Wright I would think of the matter and see what I could do that would be to my interest, and that if I concluded to make a purchase of his interest I would let him know, if he would leave me his address, which he did as an employe in
537 the Pennsylvania railroad office on South 4th street; the matter stood in that shape for some considerable length of time; I subsequently met Mr. Vaughan in the negotiations I had with him looking to the settlement of the estate, and I recounted to Mr. Vaughan what had occurred between William L. Wright and myself—the proposition he had made—and Mr. Vaughan then told me, in a confidential way, what he knew of the character of this man Wright, which I heard, and I subsequently asked him (Vaughan) about the value of his (Wright's) interest in the estate, and he then simply recounted to me what he had theretofore done; *that the estate was insolvent and there was no material value in it, and that he did not think it would aid in any respect in getting any larger sum out*
538 *of the estate than was contemplated in the negotiations with him;* I subsequently had a talk with Wright—sent word for him to come to my office—*and I told him that I did not think, from all the information I could get, there was any material value in his interest,* but at the same time I was anxious to get what I could, and I had thought the matter over, and I would be willing to give him $250 for what interest he had and take an assignment of it; *my object at the time in making that proposition, being to have that with me when it came to the final settlement with Mr. Vaughan.*"

(Statement of facts omitted).

On April 7th, 1891, he made a statement to Mr. Waln, counsel for the complainant, which Mr. Waln reduced to writing, on the spot, as follows:

"George M. Wright and others were interested in the Pennsylvania, New England & Slatington Railroad Company, and borrowed money from various parties in New Jersey, on their notes; I purchased of the trustees, for their creditors, assets in their hands and the notes, amounting to about $150,000; I had from the trustees and inventory of the property of the Wright estate, supposed to show the value of the estate; W. L. Wright
539 called on me and stated the estate was worth a great deal more money than contained in the inventory; I made inquiry about this young man and found he was not to be believed; he gave me all the information set out in his statements; I knew that W. L. Wright was deviling his mother, and I thought it would be an act of kindness to get him out of the way; *before I purchased his interest, I met Mr. Vaughan, and Mr. Vaughan told me to buy W. L. Wright's interest in his father's estate; I agreed with Vaughan to sell it to him, if I got it, for the same figure I gave;* the Hightstown Bank got a judgment against me for $15,000; the estate of Wright paid me that; it was on a note endorsed by me for Wright."

540 Vaughan, in his evidence, does not deny Gibbs' account of his interview with Vaughan, in which, according to Gibbs, Vaughan declared the estate was insolvent.

(Here follows testimony of Vaughan, omitted).

Taking these two accounts together, and the evidence of Vaughan and Gibbs, it is plain that Gibbs had an interview with Wright some time before December 9th, 1886, (he swears not earlier than October 1st), which is the date of the letter from Grey to Mrs. Wright; that he wrote the result of the interview to Vaughan; that the

letter of December 9th of Grey to Mrs. Wright brought Vaughan to Camden; that on the advice of Grey he authorized Gibbs to buy complainant's share at not more than $500, and that it was bought by Gibbs accordingly, and that the purchase was made upon the representation to Wright, by Gibbs, acting for Vaughan, that the estate was insolvent, and that his object in buying it was to assist him in settling with the estate, and that his statement to complainant was false in that respect. It is quite clear that this representation of insolvency was not only made at the first interview, but reiterated at the date of the actual transfer.

541 William L. Wright was sworn and gave his account of the transaction before either Gibbs or Vaughan was sworn. The effect of his evidence is that four months after his father's death he was driven away from the house at Bordentown, went to Philadelphia and had little or no communication with his family from that time on, except to ask his mother for money.

(Here follows statement of facts).

He swears that his first interview with Mr. Gibbs was in September, 1885, a year and more before the transfer, when he called upon him at his office in Walnut street.

He does not state the object of the visit nor what oc-
542 curred.

A year later, in the fall of 1886, and previous to the transaction with Gibbs, he was at work as a clerk in the office of the Pennsylvania railroad, and the effect of his evidence is that he did not himself seek Mr. Gibbs in the first instance, but was sent for by Mr. Gibbs to come and see him. In that he is in conflict with Mr. Gibbs, who swears that the first interview he had with Wright, which was not earlier than October 1st, 1886, was sought by Wright, and that it was for the second interview that he sent a messenger for him. Wright, on the other hand, in effect swears that he was first sent for by Gibbs relative to this affair, and that Mr. Gibbs began to talk

to him about the affairs of the estate, showed him a copy of the inventory and also a number of promissory notes which his father had indorsed, amounting to about $183,000, and told him that he, Gibbs, was involved personally in the obligations arising out of the building of the railroad, and that he could get no settlement of the estate. He says that Gibbs told him that the family did not show any inclination to settle with him, and that there would be nothing left of the estate, and that if he, Gibbs, had the complainant's interest he could close the thing; that the ownership of that interest would help him to accomplish that result; and he swears that the tone of the
543 conversation was that he was not friendly with the family, but that his feelings were hostile to them: he said the estate was insolvent after adding to the inventory the assets which were not shown on it—the suppressed assets. The complainant further swears that Gibbs stated to him that he had a knowledge, derived from other sources, that there was property belonging to his father's estate which was not on the inventory, but after adding those assets not on the inventory there was not enough to meet the liabilities, and that he stated to him distinctly that the estate was insolvent, and that his, the complainant's interest was valueless, and that he would never be able to get anything, but that if he, Gibbs, had the complainant's interest it would help him to close the estate and get him out of trouble in his business relations.

He said that the ownership of complainant's share
544 would help him to force a settlement of the estate, and that he would like to own the complainant's interest; and the complainant told him he would sell it to him for $500, and that he went away, and after thinking it over went back to Gibbs and told him that he would take $250, and says that Gibbs shortly afterwards sent for him and had the assignment already prepared to execute, and that he went before a notary to sign it, and at that very time Gibbs assured him that the estate was perfectly worthless, and that he bought it for the purpose of helping himself out; and the complainant

disavows any knowledge of the real condition of the estate as it was afterwards developed, and declared that in selling he relied partly on Mr. Gray's letter and partly on what Gibbs assured him as to the condition of the estate. He says that after that he had an interview with his brother-in-law, Vaughan, and that he reviled him and told him that it was his money that had bought his interest, and that he had given money to Gibbs to purchase it.

(Here follows statement of facts).

The question whether Gibbs opened the negotiation for the purchase of the complainant's interest by sending for him to come and see him, or whether the complainant went of his own accord in the first instance to Gibbs and offered to sell, was discussed by counsel on both
545 sides. Its importance lies wholly in aiding to determine the question whether or not the project of buying complainant's interest was originally set on foot by Vaughan, or whether it was taken up by him after the complainant had first intimated a disposition to sell. For I see no reason to suppose that Gibbs himself would have sent for the complainant and attempted to buy his interest, unless he had first been requested to do it by Vaughan. And if it were necessary to decide the question, I should be quite as much inclined to believe the complainant as Gibbs in that behalf. But I do not deem it necessary to determine that question. For if it be admitted that the complainant first went to Gibbs, the fact remains that Gibbs, acting in the interest of
546 Vaughan, took advantage of the complainant's necessities and of his ignorance of the true condition of the estate, and also himself asserted what he knew to be untrue, viz.: that the estate was hopelessly insolvent, by showing, first, the inventory, and then the notes to the amount of about $180,000 which he claimed to hold against the estate, and that he made a false pretence of wishing to buy it to aid himself in settling with the administratrix. And it seems to me, if it were admitted that Vaughan did not authorize Gibbs to make any un-

true representations to complainant, yet as Gibbs was, on the facts, in effect, acting as the agent for Vaughan, the latter cannot take advantage of his agent's fraud, and his title is subject to the same vice as was that of Gibbs.

No authority is necessary for the position that complainant, upon his view of the case, is entitled to relief. And I am of the opinion that his unfilial and outrageous treatment of his mother, shown by a great number of insulting letters and postals which he sent her from time to time, does not deprive him of his rights. The question is not, at this time, between the complainant and his mother or next of kin—though if it were it would make no difference—but between him and his brother-in-law,

Vaughan; and his low and degraded character and
547 general unworthiness and worthlessness do not put

him beyond the protection of the law of the land, and do not give a license to anybody to practice a fraud upon him. His conduct may be immoral, it may be unworthy, it may be unfilial, but it is not inequitable in such a sense as to debar him of his right to lay hold of the horns of the altar of justice, and thus demand his right.

At the hearing it was urged on behalf of the defendant Vaughan, that, as to what has been called the "suppressed assets," complainant stands *in pari delicto* with Vaughan, and cannot ask aid from this court.

I am unable to adopt that view for several reasons.

One is that it was not set up in the answer. That
548 pleading alleges that there was no suppression—that

the shares of the rubber stock and of bank stock were transferred for a valuable consideration. The proof shows that they have all been distributed as a part of the estate, the bank shares having been first transferred by Vaughan to Mrs. Wright as administratrix, and by her distributed; and the defendant Vaughan, claiming as assignee of the complainant, received the share which would otherwise have come to the complainant. It seems to me that Vaughan, having received the share by reason of standing in complainant's shoes, which position he oc-

cupied as the result of a fraud practised on the complainant, cannot now be heard to say that complainant was never entitled to receive it. Whatever defect was in complainant's title was waived by the administratrix when she recognized Vaughan as complainant's substitute and paid and distributed to him a share of the estate. The complainant was deprived, by Vaughan's fraud, of the opportunity to assert his right to it, and cannot now be told by the person who succeeded in receiving it that he could not have succeeded if he had not parted with his right to try.

With regard to the distribution of cash—that seems to have come from various sources; and it does not appear
that any special distribution was made of the pro-
549 ceeds of the suppressed notes, etc. Then I am not satisfied by the evidence that complainant does stand *in pari delicto* in the suppression of those assets. The brains of that part of the transaction were undoubtedly furnished by Vaughan, and the complainant merely acquiesced.

The bill was filed upon the theory that this interest of the complainant in his father's estate was held by Vaughan for the benefit of the next of kin. This may be so in point of fact, but it does not appear so in the evidence. That shows that there has been from time to time a distribution, or rather several distributions, of the estate, some of it in specie, some of it in cash, and in that distribution it was divided into the original shares, pre-
550 cisely as if the complainant had not assigned his share, and the share which would have come to him was transferred to and paid to Vaughan. The complainant is at present, therefore, entitled to a decree setting aside the several transfers from himself to Gibbs, and from Gibbs to Vaughan, and for a reconveyance by Vaughan to him, in such manner as to pass title to real estate, and to an account against Vaughan of what he has received under the several distributions referred to.

The bill also prays for an accounting by the administratrix of her dealings with the estate, and that com-

plainant may have the share in the estate which he conveyed to Gibbs. Mrs. Wright answers and sets up an accounting in the orphans court. Complainant in that situation prayed for leave to amend his bill and attack that account. I will hear counsel as to the propriety of such an amendment.

The bill also prays that Vaughan may be decreed to convey certain premises, not described or identified, situate in Bordentown, to the heirs of George M. Wright, deceased. The allegation on which that prayer is founded, and which are sustained by the proofs, are that in the lifetime of George M. Wright he purchased and paid for certain real estate in Bordentown (not described), and had the title conveyed to Mr. Vaughan and the convey-
551 ance recorded; that Vaughan thereupon made a conveyance to George M. Wright of the same premises, and delivered it to him, but that it was never recorded, and that on his death-bed that deed was produced and destroyed. I will hear counsel, also, as to whether any relief can or should be granted in that respect in this cause, or whether the complainant, when there shall have been a reconveyance to him by Vaughan, should not raise the whole question by bill for partition of that and other real estate of which Wright died seized.

The complainant is entitled to costs against Vaughan.

The defendants who joined in the answer with
552 Vaughan and made common cause with him, are not entitled to costs. The complainant proved gross errors in the inventory and account in the orphans court, and failed to obtain a decree in that behalf simply because he had failed to set up and attack it in advance. The indications are that the distribution of the estate has been made quite irrespective of that accounting, and that the accounting to be had against Vaughan in this cause will give complainant all he is entitled to in that respect.

Gibbs appeared by the same solicitor as the other defendants, and his answer was framed in their interest, and was untruthful. He is not entitled to costs.

Exhibit 51.

AFFIRMANCE BY COURT OF ERRORS AND APPEALS OF NEW JERSEY.

The record of affirmance by the Court of Errors and Appeals is as follows:

JANE M. WRIGHT, administratrix, etc., of George M.
553 Wright, deceased, *et al.*
Appellants.
vs.
WILLIAM L. WRIGHT,
Respondent.

On appeal from a decree advised by Vice-Chancellor Pitney, whose opinion is reported in Wright *vs.* Wright, 6 Dick. Ch. Rep. 476.

Messrs. Grey & Grey, for the appellants.
Mr. John W. Wescott and S. Morris Waln (of Philadelphia) for the respondent.

554 PER CURIAM.

Decree affirmed, for reasons given in the court of chancery.

For affirmance—The Chief Justice, Abbett, Depue, Reed, Van Syckel, Krueger, Smith—7.
For reversal—Dixon, Phelps—2.

FAYERWEATHER *vs.* RITCH.
REYNOLDS *vs.* RITCH.

COMPLAINANTS' PROOFS.

NEW YORK, February 5th, 1901.

Met pursuant to adjournment.

Present:—The Examiner, Mr. Blaikie, Mr. Bovee, Mr. Carnochan, Mr. Fair, Mr. McLoughlin, a representative of Nash & Jones, a representative of Russell & Holmes, and a representative of Root, Howard, Winthrop & Stimson.

555

UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF NEW YORK.

FAYERWEATHER
vs.
RITCH.

Exhibit 52.
Opinion of
Lacombe, C. J.

556 LACOMBE, C. J.

The introduction of the "Opinion" would necessarily open the door to deciding the issue whether or not it was correct, and thus new issues would be introduced not presented by the pleadings. Furthermore, the "opinion" is clearly incompetent as proof of "similar fraud," which appears to be the theory on which complainant relies. The testimony of the witness, Westcott, may be struck out and the "opinion" with it.

Exhibit 53.

POWER OF ATTORNEY FROM DEFENDANT'S PROOFS, PAGE 349, LUCY FAYERWEATHER TO JOHN B. REYNOLDS, JUNE 4TH, 1892.

To whom it may concern, Know all men by these presents:

That whereas, I, Lucy Fayerweather, of the City, County and State of New York, widow of Daniel B.
557 Fayerweather, late of said City, deceased, have hitherto, to wit: since the twelfth day of June, A. D., 1891, passively acquiesced in, and assented to, the terms of compromise and discontinuance, effected on or about said date, of a certain proceeding at law then pending in and before the Surrogate's Court of the County of New York and State of New York, entitled, in the matter of the Probate of the last will and testament of Daniel B. Fayerweather, deceased, wherein I the said Lucy Fayerweather, and others were parties plaintiff, and the executors of the last will and testament of said Daniel B. Fayerweather, deceased, were parties defendant.

And whereas; my said passive acquiesence in and
558 submission to the terms and conditions of said compromise and discontinuance were due to my condition of physical weakness, the result of protracted illness, whereby I was at the time of said compromise and discontinuance, and long afterwards continued to be unfit and practically incapacitated to transact business and to rightly understand the terms of said compromise and its consequences to myself and those dependent upon me; which consequences I now understand and deplore and am no longer willing to acquiese in or be bound by.

Now therefore, reposing special confidence and trust

in John B. Reynolds, of the City, County, and State of New York, I hereby constitute and appoint the said John B. Reynolds to be my true and lawful attorney in fact, for me and in my name, place and stead to promptly use all lawful means for the annulling and setting aside, or modification in my favor as he may under the advice of counsel skilled in the law, of said compromise, and of each and all of the acts in any way affecting me or my interests thereunder.

Hereby authorizing and empowering my said attorney in my name to employ counsel; to bring any and all proceedings and suits at law and in equity in and before
559 any court or courts in said State or elsewhere; to carry on or prosecute the same and defray at my own proper charge and cost the necessary expenses thereof; to make and execute in my name any and all contracts and other papers which may in his discretion be necessary or convenient to the initiation and conduct of any proceedings, suit or suits for the enforcement of my right to the possession, ownership and enjoyment of a reasonable and satisfactory share of the property and estate of my said husband, the late Daniel B. Fayerweather, deceased; and to do and perform every act and thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as I might or could do if personally present, without power of sub-
560 stitution, hereby ratifying and confirming all that my said attorney, the said John B. Reynolds, shall do or cause to be done by virtue thereof.

In witness whereof, I have hereunto set my hand and seal on the 4th day of June in the year of our Lord, one thousand eight hundred and ninety-two.

Sealed and delivered in
presence of John Goode.

Lucy Fayerweather. [seal].

CITY AND COUNTY OF NEW YORK, ss:

On this fourth day of June, 1892, before me personally came the above named Lucy Fayerweather, to me known and known to me to be the person described in and who executed the foregoing instrument and she acknowledged to me that she executed the same for the uses and purposes therein mentioned,

JOHN GOODE,

Notary Public, 119,

[SEAL]. New York County.

561

Exhibit 54.

SURROGATES' CERTIFICATE OF LETTERS TESTAMENTARY TO JOHN B. REYNOLDS AS SOLE EXECUTOR OF THE LAST WILL AND CODICIL OF LUCY FAYERWEATHER— MARKED "COMP'S EX, MCH. 4, '01, C. B."

562

THE PEOPLE OF THE STATE OF NEW YORK,

TO ALL WHOM THESE PRESENTS SHALL COME, OR MAY CONCERN, SEND GREETING:

Know Ye, That we having inspected the Records of our Surrogate's Court in and for the County of New York, do find that on the 16th day of September, in the year one thousand eight hundred and ninety-two by said Court, Letters Testamentary on the Estate of Lucy Fayerweather, late of the City of New York, deceased, were granted and committed unto John B. Reynolds of said city.

(Letters Testamentary issued to Morris B. Beardsley of Bridgeport, Conn., revoked by Surrogate's Decree filed October, 18th, 1895).

the Executor named in the last Will and Testament of said deceased, and that it does not appear by said Records that said Letters have been revoked.

IN TESTIMONY WHEREOF, we have caused the seal of the Surrogates' Court of the County of New York to be hereunto affixed. [SEAL].

563

WITNESS, Hon. ABNER C. THOMAS, a Surrogate of our said County, in the City of New York, the 28th day of February, in the year of our Lord one thousand nine hundred.

J. FAIRFAX MCLAUGHLIN,

Clerk of the Surrogates' Court.

Internal Revenue Stamp. 10 Cents.

564

Exhibit 55.

LACOMBE, J., THAT THE WITNESS BUTLER MUST TESTIFY TO CONTENTS OF BURNED CODICIL.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FAYERWEATHER, *et al.*,

565 *vs.*

RITCH, *et al.*

Application to compel a witness to answer questions certified by the examiner, sitting to take testimony in equity. One of the issues upon which complainant is seeking to put in proof is as to the destruction of a document, executed by a deceased testator and known as "the fourth codicil," and complainant is seeking to show the contents of such codicil, which he contends was duly executed by testator in the presence of subscribing witnesses. The witness under examination is the counsel of deceased who took his instructions for the prepara-
566 tion of the codicil, drew it up, delivered it to the testator, and apparently saw him execute it. Presumably he is able to testify what were the contents of the document (since destroyed) and so far as appears no other witness is able to do so. The witness declines to testify to the contents of the document, contending that his lips are sealed as to communications with his client both by well recognized principles of jurisprudence, and by the statute of the State of New York.

LACOMBE, Circuit Judge:

It is a sound public policy which provides that an at-

torney or counsel should not be allowed to testify to any of the transactions or conversations between himself and his client which led up to the preparation of any document. But when the document, be it a will or a contract or what not, has been executed, its contents are no longer confidential, the reason for the rule ceases, and the counsel may as properly testify to the contents as may any other witness who knows such contents.

The statute of the State of New York provides (Code of Civil Procedure, Sec. 835) that: "An attorney or counsellor at law shall not be allowed to disclose a communi-
cation made by his client to him or his advice given
567 thereon, in the course of his professional employ-
ment."

At the time the cause hereinafter referred to was before the Courts the next section, 836, provided that "Sec. 836. The last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient or the client." While the statute stood thus the case of *In re* Coleman came before the Court of Appeals, 111 N. Y., 220. Counsel who had prepared the will of deceased under instructions from him and had subsequently at his request signed the attestation clause as witnesses were allowed to testify to the circumstances attending its execu-
tion, including the condition of his mental faculties
568 at that time. This was upon the theory that the re-
quest to witness his will was a waiver of the privilege which the statute conferred. The language of the Court was broad enough to warrant the finding of a like waiver as to the mere contents of the document, in the execution of the instrument by deceased. "It would," says the Court, "be contrary to settled rules of law to ascribe to the testator an intention, while making his will and going through the forms required to make it a valid instrument, to leave in operation the provisions of a statute which he had power to waive, but which, if not waived, might frustrate and defeat the whole object of his action." And certainly the whole object of a testa-

tor's action would be destroyed if, his executed will being by some accident destroyed, the only witness who could testify to its contents was forbidden to testify thereto. Since the Coleman case the statute (Sec. 836) has been amended so that it now reads: "Sec. 836. The last three sections apply to any examination of a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or the client. * * * But nothing herein contained shall be construed to disqualify an attorney in the probate of a will heretofore executed or offered for probate or hereafter to be executed or offered for pro-
567 bate from becoming a witness, as to its preparation and execution in case such attorney is one of the subscribing witnesses thereto." But even in their present form the two sections (835 and 836) taken together seem not to be applicable to the cause at bar, provided the testimony sought to be elicited from counsel is strictly confined to a statement of the contents of a document which ceased to be confidential when it was executed. The execution of the document, however, does not make the transactions and conversations between counsel and client which led up to its execution any the less confidential, and as to such transactions and conversations there is no express or even any implied waiver. The privilege covers also all conversations and transactions with the
568 client's agent or intermediary.

The witness, therefore, should answer, if he knows, as to whether or not a paper prepared by himself as counsel was in fact signed by deceased in the presence of attesting witnesses in the form and manner required to constitute a valid publication of such paper as a testamentary document; and, if he knows, or as far as he knows, he should state the contents of such published document, if he testify that the document was in fact thus published. The objections to all other questions enquiring as to conversations and transactions with his client or his client's agent leading up to the preparation and execution of such document are sustained. The case of Glover

vs. Patten, 165 U. S. 394, has not been overlooked, but it does not seem to be controlling to a contrary decision.

Oct. 22, 1898.

Exhibit 56.

ORDER OF LACOMBE, J., DIRECTING WITNESS BUTLER TO TESTIFY TO CONTENTS OF BURNED CODICIL.

569

Ordered, that said Prescott Hall Butler attend before the examiner herein at 2:30 p. m., on the 25th day of October, 1898, or at some other convenient time to be agreed upon, and then and there answer, if he knows, as to whether or not a paper prepared by himself as counsel was in fact signed by Daniel B. Fayerweather in the presence of attesting witnesses in the form and manner to constitute a valid publication of said paper as a testamentary document; and, if he knows, and as far as he knows, state the contents of such published document, if he testify that the document was in fact thus published. The objection to all other questions inquiring as to con-
570 versations and transactions with his client, or his client's agent, leading up to the preparation and execution of such document, are sustained.

October 24th, 1898.

E. H. Lacombe,

U. S. Circuit Judge.

Exhibit 57.

ORDER OF LACOMBE, J., COMMITTING WITNESS BUTLER FOR CONTEMPT.

Parties counsel and the said witness, thereupon went before the court, and the counsel for the complainants moved the Court upon the foregoing record that the witness Prescott Hall Butler be committed to the custody of the Marshal and retained in custody until he should have purged the contempt committed by his refusal to an-
571 swer the question by making answer to the same, whereupon

The Court Adjudges, That the said refusal is a wilful contempt of this Court and that the same tends to impede, prejudice and impair the rights of the complainants herein, and thereupon orders and adjudges the said witness, Prescott Hall Butler, be and he is hereby committed to the custody of William Henkel. Marshal of the United States for the Southern District of New York, and that he be confined in his custody until he shall purge the said contempt by making answer to said question by stating the contents of the paper therein referred to.

And it is Further Ordered, That a transcript of this order attested by the Clerk of this Court under his
572 seal shall be due and sufficient warrant to said Marshal for taking and retaining the said Prescott Hall Butler as aforesaid.

Adjourned to October 31st, 1898, at 2 p. m.

Exhibit 58.

OPINION OF U. S. COURT OF APPEALS ON BUTLER WRIT OF ERROR.

FEDERAL REPORTER VOLUME 91.

BUTLER
vs.
573 FAYERWEATHER *et al.*

Circuit Court of Appeals, Second Circuit, January 5, 1899. No. 15.

In Error to the Circuit Court of the United States for the Southern District of New York.

JOSEPH H. CHOATE, for plaintiff in error.
ROGER M. SHERMAN, for defendants in error.

Before WALLACE and SHIPMAN, Circuit Judges.

574 WALLACE, Circuit Judge.

This is a writ of error to review an order committing the plaintiff in error for contempt, in default of answering certain questions propounded to him as a witness in an equity cause pending in the court in which the order was made. The witness was a party to the cause and based his refusal to answer the questions upon the ground of privilege; he being an attorney, and asserting the questions to call for professional communications of his client.

It is insisted for the defendant in error that the order cannot be reviewed upon a writ of error, but only upon

appeal from a final decree in the cause in which it was made. This court, in *Gould ex. Sessions* 35 U. S. App. 201 14 C. C. A. 366 and 67 Fed. 165, held a contempt of court to be a criminal offense, and an order imposing a fine therefor to be a judgment reviewable by a writ of error at the instance of the party aggrieved. It was determined in Crosby's Case, 3 Wils. 188, and declared by the supreme court in *ex parte* Kearney, 7 Wheat. 38, that an adjudication for a contempt was a conviction, and a commitment in consequence an execution. In New Orleans *ex.* Steamship Co., 20 Wall. 392, the Supreme court said: "Contempt of court is a specific criminal 223 offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition and at the hearing."

In *re* Debs, 158 U. S. 564, 15 Sup. Ct. 900, the defendants in an equity cause were committed for contempt for the violation of a preliminary injunction restraining them from committing the acts to enjoin which the suit was brought, and upon an application to the Supreme court for a writ of error the writ was denied upon the ground that the order of committal was not a final judgment or decree.

That was a case in which the propriety of the order 226 could have been considered by the court which made it as final decree, and, being an interlocutory order in the progress of the cause, could only be reviewed by the Supreme court upon an appeal from the final decree. The case is quite different, however, when a person not a party to the cause is imprisoned or fined for contempt. The order proceeds upon a matter distinct from the general subject of the litigation. The aggrieved party has no opportunity to be heard when the cause is before the court at final hearing, and so to him the proceeding is finally determined when the order is made. Not being a party to the cause, he could not be heard on an appeal from a final decree; and, unless he can be heard by a

writ of error, he has no review, but must submit to the determination of the court below, if the court has jurisdiction, however unwarranted it might be by the facts or the law of the case? It would be a reproach to the administration of justice if the statutes of the United States conferring appellate jurisdiction upon this court to review all final decisions of the circuit court failed to provide any means of review to the citizen who has been deprived of his liberty or required to pay a fine without just cause. We think the power conferred extends to a case like the present.

Whenever, in a cause there is a determination of
577 some question of right, a decision is final, in the sense in which an appeal from it is permitted, if it decides and disposes of the whole merits of the cause as between the parties to the appeal reserving no further questions or directions for the further judgment of the court, so that to bring the cause again before the court for decision will not be necessary. Mackeye *vs.* Mallory (decided by this court Feb. 23, 1897) 24 C. C. A. 420 79 Fed. 1 Rouse *vs.* Hornby, 14 C. C. A. 377 67 Fed. 219; Gumbel *vs.* Pitkin, 113 U. S. 545, 5 Sup. Ct. 616; Central Trust Co. *vs.* Grant Locomotive Works, 135 U. S. 207, 10 Sup. Ct. 736.

Upon its merits, the appeal presents the question whether an attorney who has prepared a codicil to a
578 will alleged to have been executed and published by the testator, his client, and fraudulently destroyed by one of the executors named in a subsequent codicil, can be required to disclose its contents, and whether it was signed by the testator in the presence of attesting witnesses, in form and manner to constitute a valid publication; the attorney being present at the time of the alleged publication, but not being an attesting witness. Irrespective of the effect of the statute of this state, the question would be free from doubt.

The rule of evidence which forbids an attorney, without the consent of his client, to disclose communications made to him professionally by the client, applies gener-

ally to the contents of documents intrusted to him, unless he is a subscribing witness, whether the documents are evidence of title, formal iustruments, or merely letters or memoranda. 2 Tayl. Ev. 911 936. If he has attested an instrument for his client, the professional relation is thereby abandoned *pro hac vice;* and he may be compelled, not only to prove its execution, but all that passed at the time. An exception to the general rule exists in the case of testamentary dispositions (1 Whart. Ev. 591) upon the principle that the disclosure can affect no right or interest of the client. In Blackburn *vs.* Crawfords, 3 Wall. 175, it was held that an attorney who
579 drew a will could testify as to statements made by the testator about the legitimacy of his children and his relations to their mother, made in interviews between him and the attorney preceding and connected with the preparation of the will. In Glover *vs.* Patten, 165 U. S. 394, 17 Sup. Ct. 411, it was held in a suit between devisees under a will, that statements made by the testator to counsel respecting the execution of the will or of similar documents were not privileged.

By section 858 of the Revised Statutes of the United States, the laws of the state in which the court is held are the rules of decision for the courts of the United States as to the competency of witnesses in equity causes as well as in trials at common law; and, as construed
580 by the Supreme court in its latest utterances upon the subject, this provision supplies the criterion of the competency of evidence as well as the competency of witnesses. Connecticut Mut. Life Ins. Co. *vs.* Union Trust Co. 112 U. S. 250-5, 5 Sup. Ct. 119 Ins. Co. Robinson, 19 U. S. App. 266, 7 C. C. A. 444, and 58 Fed. 723. In this state the common-law rules of evidence in respect to privileged communications have been materially changed by Code Civ. Proc. 835, 836. Whether these changes were inconsiderate, and due to hasty and superficial legislation, or whether they were made with a deliberate purpose to seal the lips of witnesses in cases where the courts had refused to do so, it is unnecessary to inquire. The

Statute must be given the effect which its language requires. Originally the Code merely provided that an attorney or counsellor at law should not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment, unless that provision should be expressly waived by the client. The statute came before the court of appeals of New York for construction in two cases decided in 1888. In *re* Coleman's Will 111 N. Y. 229, 19 N. E. 71 and Loder *vs.* Whelpley, 111 N. Y. 239, 18 N. E. 874. In both of these cases it was held that the prohibition of the Code precluded the disclosure of in-
581 structions given by a testator to an attorney employed to draw his will; but in Coleman's Case it was held that, where the attorney became the attesting witness to the will at the request of the testator, the prohibition was "expressly waived," within the meaning of the Code, and the attorney was competent to testify as to all the circumstances attending the execution of the instrument. Thereafter the Code was amended so that the prohibition should apply unless "expressly waived upon the trial" by the client, but should not disqualify an attorney "in the probate of a will" from becoming a witness "as to its preparation and execution," if one of the subscribing witnesses thereto. As the statute now reads,
no act of the client except a waiver upon the trial,
582 can be treated as a waiver of the prohibition of disclosure; and, except he is an attesting witness to a will, in no case is an attorney permitted to make disclosure in respect to the contents of any documents or other information communicated to him in the course of his professional employment by the client. It follows that the plaintiff in error properly declined to disclose the contents of the codicil, or testify to the declarations of the testator attending its execution.

The circumstances that other witnesses were present at the time when the codicil is alleged to have been executed and published, even though they heard all that took place, and were aware of the contents of the instrument,

is wholly immaterial. Under such circumstances the other witnesses are permitted to testify to the communitions which pass between client and attorney. Jackson *vs.* French 3 Wend. 337; Hoy *vs.* Morris, 13 Gray, 519; People *vs.* Buchanan 145 N. Y. 1, 39, N. E. 846. Nor does the circumstance that the complainants may be able to prove that the codicil was fraudulently destroyed by one of the persons who was appointed an executor of the will by a subsequent codicil deflect the operation of the rule against disclosure by the attorney. Probably the statute is not to be construed as intended to apply to cases of fraud contrived by the client and solicitor in con-
583 cert or to communications between them made in the course of a criminal scheme. Before the statute the privilege did not apply to all communications between client and attorney, but only to such as passed between them in professional confidence; and the courts generally repudiated the proposition that the contriving of a fraud or the conniving in a crime could form part of the professional occupation of an attorney or counsel. There is no pretense in this case that the codicil, or anything which took place at the time of its alleged publication, was of a fraudulent or criminal nature.

We conclude that the order of the court below was an erroneous exercise of power, and it is therefore reversed.

584

Exhibit 59.

ORDER OF U. S. COURT OF APPEALS REVERSING DECISION THAT BUTLER DISCLOSE CONTENTS OF BURNED CODICIL.

At a Stated Term of the United States Circuit Court of Appeals for the second Circuit held in the Court room of said court, in the U. S. Court and Post Office Building in the Borough of Man-
585 hattan, in the City of New York, on the 12th day of January, 1899.

Present—Honorable WILLIAM J. WALLACE.
NATHANIEL SHIPMAN, Judges.

PRESCOTT HALL BUTLER,
Plaintiff in Error,
against
EMMA S. FAYERWEATHER and
586
MARY W. ACHTER,
Defendants in Error.

This cause having come on to be heard on a writ of error to the Circuit Court of the United States for the Southern District of New York in the 2nd Circuit to review an order or judgment entered herein on the 29th day of October, 1892, adjudging Prescott Hall Butler the Plaintiff in Error, in the above entitled cause to be guilty of a contempt of court, committing him to the custody of William Henkel, Marshal of the United States, directing that he be confined in the custody of the said Marshal

until he shall purge the contempt by making answer to a certain question propounded to him in the suit, wherein the defendants in error above named are complainants and Thomas G. Ritch and others are defendants.

Now after hearing Joseph H. Choate, Esquire, as counsel for the Plaintiff in error, and Roger M. Sherman, Esq., as counsel for the Defendants in error, and due deliberation having been had, and on motion of Evarts, Choate and Beaman, attorneys for the complainants in error, it is ordered said order or judgment of the Circuit be and the same hereby is in all things reversed, with costs to be taxed, to be paid by the defendants in
587 error to the plaintiff in error, and that a mandate issue out of the said Circuit Court in accordance therewith.

W. W. J. W.

Exhibit 60.

ORDER OF LACOMBE, J., ON MANDATE OF U. S. COURT OF APPEALS.

588

Mr. Sherman: Counsel for the complainants offers in evidence the order of the United States Circuit Court for the Southern District of New York on a mandate from the Circuit Court of Appeals for the Second Circuit, made in a proceeding instituted by Mr. Prescott Hall Butler, the proceeding in the Circuit Court of Appeals being entitled "Prescott Hall Butler, plaintiff in error, against Emma S. Fayerweather and another, defendants in error," pursuant to that mandate, reversing the order adjudging Mr. Butler to be in contempt and reversing its ruling in this suit requiring Mr. Butler to answer certain questions, which is as follows:

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, held at the United States Court and Post Office Building, in the Borough of Manhattan, the City of New York, on the 19th day of January, 1899.

Present—Hon. E. Henry Lacombe, Circuit Judge.

In the Matter
591 of
The application to punish Prescott Hall Butler for contempt for refusing to obey an order directing him to answer a question propounded to him in the suit between Emma S. Fayerweather and Mary W. Achter, complainants, and Thomas G. Ritch, individually and as Executor and Trustee of the Last Will
592 and Testament of Daniel B. Fayerweather, deceased, and others, defendants.

This cause having been brought on upon the mandate sent down from the United States Circuit Court of Appeals for the Second Circuit and now filed in this Court, by which mandate it appears that a writ of error was sued out by Prescott Hall Butler, a witness called in the suit between Emma S. Fayerweather and Mary W. Achter, complainants, and Thomas G. Ritch, individu-

ally and as executor and trustee of the last will and testament of Daniel B. Fayerweather, deceased, and others, defendants to this Court to review an order, or judgment, made and entered herein October 29, 1898, which adjudges said Prescott Hall Butler guilty of a contempt of Court in refusing to answer a certain question propounded to him in the said suit, and committed him to the custody of William Henkel, Marshal of the United States for the Southern District of New York, until he should purge the said contempt by making answer to the said question; and it further appearing that said cause came on to be heard in said United States Circuit Court of Appeals
593 for the Second Circuit, and that the said order or judgment, of October 29, 1898, aforesaid, was reversed with costs to said Prescott Hall Butler to be paid by the said Emma S. Fayerweather and Mary W. Achter, and that that Court directed such further proceedings to be had in this cause in conformity with the opinion of that Court as according to right and justice and the law of the United States ought to be had,

Now, therefore, on motion of Evarts, Choate & Beaman, attorneys for said Prescott Hall Butler,

It is Ordered and Adjudged, that the judgment of the United States Circuit Court of Appeals for the Second Circuit be and the same hereby is made the judgment of this Court, and

594 It is Further Ordered and Adjudged, that the said order or judgment entered herein October 29, 1898, be, and the same hereby is, in all respects reversed, vacated and set aside, and

It is Further Ordered and Adjudged, that the said Prescott Hall Butler properly refused to answer the said question propounded to him and which he was directed to answer by order dated October 24, 1898, and entered in the minutes of the said suit in which Emma S. Fayerweather and Mary W. Achter are complainants, and Thomas G. Ritch individually and as executor, etc., and others are defendants, and that the said Prescott Hall

Butler was not guilty of a contempt of Court in refusing to answer the said question, and

It is Further Ordered and Adjudged, that said Prescott Hall Butler recover from Emma S. Fayerweather and Mary W. Achter the sum of one hundred and ninety-four dollars and thirty-five cents, his costs as taxed in the said Circuit Court of Appeals, and the further sum of Forty-seven dollars and sixty-five cents, his costs as taxed in this Court, amounting in all to the sum of Two hundred and forty-two dollars, and that he have execution therefor.

E. HENRY LACOMBE,

595 U. S. Circuit Judge

The complainants objecting and excepting to all said orders and proceedings upon the ground that the same, subsequent to the order adjudging Mr. Butler in contempt, are not authorized by any statute of the United States, and especially by the Judiciary Act 1891 and acts amendatory thereof, and that said proceedings and all of them subsequent to said adjudication of contempt are *coram non judice*, null and void. And complainants protest that the deprivation of the testimony of the said Butler by said proceedings is in violation of the Constitution of the United States and of the statutes thereof, and on each of those grounds the complainants except to all
596 those proceedings and the interruption and violation of the complainants' rights to due process of law in this suit.

Adjourned to February 2d, 1899, at 2 p. m.

Exhibit 61.

RECEIPT OF ARNOUX, RITCH & WOODFORD FOR THE WILL OF 1884, AND CODICILS OF D. B. FAYERWEATHER.

"Fayerweather, Daniel B., 1890. Will filed 8th December. Petition filed 8th December. Objections filed 15th December. Will admitted 4th March. Liber page on decree, Executors, Ancillary Executors, Executors, c. t. a., who have qualified: Justus L. Bulkley, Thomas G. Ritch, Henry B. Vaughan.
597 Residences of: 787 Madison avenue; Stamford, Connecticut; Orange, New Jersey. Letters issued 28th February, 1891; 26th March, 1891; recorded Liber page 7980, 23753. Attorneys for petitioner, Arnoux, Ritch & Woodford, 18 Wall street. Contest. Objections filed 15th December, 1890. Order permitting Lucy Fayerweather to withdraw waiver and to file objections within three days, entered December 12, 1890. C. L. T."

Under the heading "Receipt for will delivered after one year from date of probate or will to remain on file."

"Received original will, April 18, 1893, Arnoux, Ritch & Woodford, J. R. M."

598

Exhibit 62.

RULING OF LACOMBE, *J.*, ON MOTION TO STRIKE OUT TESTIMONY.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

599

FAYERWEATHER and ano.,

against

RITCH and ors.

LACOMBE, Circuit Judge:

Personally I do not think that the testimony objected to is relevant under the issues raised by the plea, but it is evident that complainants' ccunsel is of a different opinion, since he is putting his clients to considerable
600 expense in putting it in. It may be that he could persuade the Appellate Court to take his views of the issues, and if so, under the rule adopted by the Supreme Court and construed in Blease *vs.* Garlington, the testimony, although the Judge of first instance deems it irrelevant, should be incorporated in the record. It does not seem, therefore that this motion should be granted. The continued taking of this testimony would be a hardship to defendant were it not that complainant has offered to stipulate that opposing counsel need not attend to register objections and reserve objections to the testimony, but may raise such objections after the testimony is taken and before the record is made up for argument. This

certainly makes the archaic, cumbersome and unsatisfactory method of taking testimony in equity in the Federal Courts as little of a burden to defendants as it can be made. In view of the decision in Blease *vs.* Garlington this Court seems powerless to afford any greater measure of relief.

The proffered stipulation is approved and motion denied.

601 Counsel for the complainants stipulates that opposing counsel need not attend to register objections and reserve objections to the testimony, except objections to form, but may raise such objections after the testimony is taken and before the record is made up for argument, except objections to form which could be removed upon their being taken at the time of propounding the question. This stipulation applies only to future, and prior stipulations and withdrawals thereof must rest on their own grounds.

602

Exhibit 63.

WILL OF D. B. FAYERWEATHER, 1870.

IN THE NAME OF GOD, AMEN:

I, DANIEL B. FAYERWEATHER, of the City, County and State of New York, being of sound and disposing mind, memory and understanding, and mindful of the uncertainty of this life, do make, publish and declare this to be my last Will and Testament in manner and form following, to wit:

FIRST.

I hereby revoke all wills and papers testamentary by me at any time heretofore made.

SECOND.

I order and direct that all my just debts and funeral expenses and the costs and charges attending the proof and execution of this my will be fully paid out of my estate, by my executors hereinafter named, as soon after my decease as the same conveniently may be.

THIRD.

I give, devise and bequeath unto my beloved wife Lucy Fayerweather, my house and lot on East Fifty-seventh street, in the City of New York, known by the number Eleven and in which I now reside, together with all household furniture and personal effects therein, to have and to hold the same to herself and her heirs and assigns absolutely and forever.

[illegible]

I give, devise and bequeath unto my executors herein after named the sum of Three hundred thousand dollars ($300,000), to have and to hold the same in trust accordingly to invest and re-invest, to keep the said principal sum invested in United States Government Bonds or on first mortgage on real estate in the City of New York, or in the City of Brooklyn, of at least double the value of the amounts loaned thereon, my executors to have full power and discretion as to selection of such investments, and to receive the income, issues and profits thereof, as and to pay the same semi-annually in the discretion of my executors, unto my said wife Lucy for and during her natural life, to and for her sole use, benefit and maintenance and support.

I request my wife out of her income to provide for the comfortable maintenance and support of Anna Amelia Joyce, for and during the natural life of the said Anna or until she marries, and I rely entirely upon the judgment and discretion of my said wife as to the manner and amount of such provision.

The provisions herein in this my will contained for my said wife to be in lieu of dower and thirds in my estate.

[illegible]

I give, and bequeath unto Charles Hennessy, porter in my store in the City of New York, the sum of One thousand dollars ($1,000).

I give and bequeath unto Edward W. Upham, of Orange, New Jersey, bookkeeper in my store in the City of New York, the sum of Five thousand dollars ($5,000).

I give and bequeath unto Rev. Levi S. Ward of the City of New Haven, Conn., the sum of Five thousand dollars.

I give and bequeath unto Lucy J. Beardsley, wife of Morris B. Beardsley, of Bridgeport, Conn., her heirs and assigns, the sum of Twenty-five thousand dollars ($25,

000), and I direct and declare that the said sum shall be for her sole and separate use and benefit, and that her receipt notwithstanding her present or any future marriage shall be a valid and effectual discharge of the same.

SIXTH.

I give, devise and bequeath unto my executor hereinafter named the sum of Twenty-five thousand dollars, to have and hold the same in trust nevertheless to invest and re-invest, to receive the income, issues and profits thereof, and to pay the same unto the said Lucy J.
607 Beardsley to and for her sole use and benefit for and during her natural life, and upon the further trust upon the death of the said Lucy J. Beardsley to divide the said principal sum and all accumulations thereof into as many equal shares as there shall be children of the said Lucy living at the time of the death of the said Lucy and children of hers who shall have died leaving lawful issue living at the time of the death of the said Lucy, the lawful issue of any deceased child of the said Lucy to represent and take collectively the share which such child would have taken if then living, and on such allotment and division I give and bequeath one of such equal shares to each child of the said Lucy living at the time of her death to have and to hold the same absolutely and
608 forever, and I do give and bequeath one of such equal shares unto the lawful issue of any deceased child of the said Lucy living at the time of her death to have and to hold the same absolutely and forever.

SEVENTH.

I give, devise and bequeath unto my said executors hereinafter named the sum of Twenty-five thousand dollars to have and to hold the same in trust nevertheless to invest and re-invest, to receive the income, issues and profits thereof, and to apply the same to the sole use, benefit and maintenance of Mary W. Fayerweather,

daughter of William Fayerweather, late of Muscatine, Iowa, deceased, for and during her natural life and upon the further trust, upon the death of the said Mary to divide the said principal sum and all accumulations thereof into as many equal shares as there may be children of the said Mary living at the time of her death, and children of the said Mary who may have died leaving lawful issue living at the time of the death of the said Mary, the lawful issue of any deceased child of the said Mary, to represent and take collectively the share which such child would have taken if then living, and on such division and allotment I do hereby give, devise and bequeath one
609 of such equal shares to each child of the said Mary living at the time of her death, to have and to hold the same absolutely and forever, and I do give, devise and bequeath one of such equal shares unto the lawful issue of any deceased child of the said Mary living at the time of her death to have and to hold the same absolutely and forever.

EIGHTH.

I give, devise and bequeath unto my said executors hereinafter named the sum of Twenty-five thousand dollars, to have and to hold the same in trust nevertheless, to invest and re-invest, to receive the income, issues
610 and profits thereof, and to apply the same to the sole use, benefit and maintenance of Emily Fayerweather, daughter of William Fayerweather, late of Muscatine, Iowa, deceased, for and during her natural life, and upon the further trust, upon the death of the said Emily to divide the said principal sum and all accumulations thereof into as many equal shares as there may be children of the said Emily living at the time of her death, and children of the said Emily who may have died leaving lawful issue living at the time of the death of the said Emily, the lawful issue of any deceased child of the said Emily, to represent and take collectively the share which such child would have taken if then living, and on such division and

allotment, I do hereby give, devise and bequeath one of such equal shares to each child of the said Emily living at the time of her death to have and to hold the same absolutely and forever, and I do give, devise and bequeath one of such equal shares unto the lawful issue of any deceased child of the said Emily living at the time of her death to have and to hold the same absolutely and forever.

NINTH.

Upon the death of my said wife the trust for her bene-
fit shall cease and determine, and the principal sum,
611 ($300,000), shall be disposed of as follows: One hundred thousand dollars thereof I give and bequeath unto Yale College at New Haven, Conn.; One hundred thousand dollars thereof I give and bequeath unto Cornell University at Ithaca, in the State of New York, and One hundred thousand dollars thereof I give and bequeath unto Princeton College, New Jersey.

And I order and direct my executors or such of them as shall qualify and survive my said wife, to pay said sums accordingly as soon after the decease of my said wife as in their discretion they can convert the same into cash and conveniently pay the same.

TENTH.

612

Out of all the rest, residue and remainder of my estate, real and personal, whatsoever and wheresoever the same may be, I give and bequeath unto Wesleyan University at Middletown, Connecticut, One hundred thousand dollars; unto Trinity College at Hartford, Connecticut, the sum of One hundred thousand dollars; unto Dartmouth College at Hanover, N. H., the sum of One hundred thousand dollars; unto Williams College at Williamstown, Mass., the sum of One hundred thousand dollars; unto Amherst College at Amherst, Mass., the sum of One hundred thousand dollars; unto Hampton University of Virginia, the sum of One hundred thousand dol-

lars; unto Lincoln University in the State of Pennsylvania, the sum of One hundred thousand dollars; unto the University of Virginia One hundred thousand dollars. And I order and direct my executors to pay said legacies to said College and University corporations to their proper officers or trustees, in the discretion of my executors as soon after my decease as in their judgment the same properly can be.

ELEVENTH.

All the rest, residue and remainder of my estate, real
613 and personal, I give, devise and bequeath unto said executors to have and to hold the same in trust nevertheles to sell and convert into cash and to divide the same equally among the several College and University corporations hereinbefore mentioned. Share and share alike.

TWELFTH.

I hereby nominate, constitute and appoint my wife Lucy, the said Edward M. Upham of Orange, New Jersey, Justus L. Buckley, Merchant of the City of New York, and Joshua M. Fiero, Lawyer of the City of New York, or such of them as shall qualify Executors of this my Will and Trustees of my estate; and I authorize and
614 empower them to sell and convey any and all of my estate, real and personal, except the real estate specifically devised to my said wife, in their discretion at such times and in such manner and on such terms and conditions as they may deem best; to make, execute and deliver any and all necessary and proper papers for the sale and conveyance thereof, and to do any and all things in their discretion expedient or necessary to the full execution of the provisions of this my Will; I order and direct that no bonds or other security of any kind be required of them or either of them, either as Executors or Trustees.

In testimony whereof, I have hereunto set my hand and seal this Ninth day of August, A. D. 1878.

D. B. FAYERWEATHER. [SEAL].

The foregoing instrument consisting of twelve pages was, at the date thereof, signed, sealed, published, acknowledged and declared by the above named testator to be his last Will and Testament in the presence of each of us, who at his request and in his presence and in the presence of each other have hereunto subscribed our
615 names as witnesses thereto, the said 9th day of August, A. D. 1878.

The words "her heirs and assigns" on page 4 line 9, and the words "share and share alike" on line 14 page 11, and "constitute" on line 16 page 11, interlined and noted before execution, also "East" on page 2 line 1.

FRANK W. ELDREDGE,

Binghampton, N. Y.

THOMAS W. PEYTON,

616 No. 114 Fourth Ave., N. Y.

The foregoing will was endorsed as follows, viz—

"Dated August, 1878."

"The last will and testament of Daniel B. Fayerweather."

CHITTENDEN & FIERO,

145 Broadway,

New York City.

Counselors at law.

Exhibit 64.

CHARTER OF AMHERST COLLEGE.

NEW YORK, June 11th, 1901.

Met pursuant to adjournment.

Present: The Examiner, Mr. Blaikie, Mr. Bovee, a representative of Nash & Jones, and a representative
617 of Root, Howard, Winthrop & Stimson.

Mr. Blaikie: I offer in evidence an exemplified copy of the charter of Amherst College and ask that it be marked Complainants' Exhibit, No. 1.

Mr. Bovee: Objected to as irrelevant and immaterial to the issues presented upon the special pleas, and incompetent; also upon the further ground that the complainants have concluded the taking of their proofs as indicated by the declaration and statement of counsel for the complainants upon this examination, and there has been no order authorizing the complainants to take additional proof.

The paper was marked Complainants' Exhibit No. 1, June 11th, 1901, C. B.

618

Complainants' Exhibit No. 1 is as follows:

(No. 64 of Appendix of Exhibits.)

COMMONWEALTH OF MASSACHUSETTS.

Executive Department.

BOSTON, January 7, 1901.

I, W. Murray Crane, Governor of the Commonwealth, do hereby certify that William M. Olin, whose genuine signature appears to the annexed certificate of authentication, is now, and was at the date of said certificate Sec-

retary of the Commonwealth, duly elected and qualified; that as such he is the lawful custodian of the Seal of the Commonwealth; that all his official acts as such are entitled to full faith and credit; that his said certificate is in due form of law; and that the Seal thereto attached is the genuine Seal of the Commonwealth.

Given under my hand at Boston this seventh day of January, in the year 1901.

W. MURRAY CRANE,

Governor.

619

Exhibit 64.

COMMONWEALTH OF MASSACHUSETTS.

Office of the Secretary.

BOSTON, January 7, 1901.

I, William M. Olin, Secretary of the Commonwealth, do hereby certify that W. Murray Crane, whose genuine signature appears to the foregoing certificate of attestation, is now, and was at the date of said certificate, the Governor of the Commonwealth of Massachusetts, duly elected by lawful authority and legally qualified
620 thereto.

In testimony of which I have hereunto affixed the seal of the Commonwealth, in my official custody and possession.

WM. M. OLIN,

[SEAL]. Secretary of the Commonwealth.

Exhibit 64.

COMMONWEALTH OF MASSACHUSETTS.

IN THE YEAR OF OUR LORD ONE THOUSAND EIGHT HUNDRED AND TWENTY-FIVE.

An Act to establish a College in the town of Amherst.

SEC. 1. Be it enacted by the Senate and House of Representatives in general court assembled and by the
the authority of the same. That there be and hereby
621 is incorporated in the town of Amherst, in the county
of Hampshire, a college for the education of youth; that the Rev. Heman Humphrey, D. D., Hon. William Gray, Hon. Marcus Morton, Rev. Joshua Crosby, Hon. John Hooker, Rev. Joseph Lyman, D. D., Israel E. Trask, Esq., Rev. Jonathan Going, Elisha Billings, Esq., Rev. James Taylor, S. V. S. Wilder, Esq., Rev. Joseph Vaill, Hon. Jonathan Leavitt, Rev. Alfred Ely, Hon. Lewis Strong, Rev. Francis Wayland, junior, and Elihu Lyman, Esq., be and hereby are constituted a body corporate, by the name of The Trustees of Amherst College; and that they and their successors, and such as shall be duly elected members of said corporation, shall be and remain a body corporate by that name forever. And for the orderly conducting the business of said corporation the
622 said trustees shall have power and authority, from
time to time, as occasion may require, to elect a President, Vice President, Secretary and Treasurer, and such other officers of said corporation, as may be found necessary, and to declare the duties and tenures of their respective offices; and also to remove any trustee from the same corporation, when, in their judgment, he shall be rendered incapable, by age or otherwise, of discharging the duties of his office, or shall neglect or refuse to perform the same; and also, from time to time, to elect new members of the said corporation; provided, nevertheless, that the number of members, (including the president of

said college for the time being, who shall, *ex officio*, be one of said corporation), shall never be greater than seventeen, and that the five vacancies which shall first happen in the board of trustees, shall be filled as they occur, by the joint ballot of the Legislature in convention of both Houses; and whenever any person, so choosen by the Legislature to fill such vacancy, or his successor, shall cease to be a member of the corporation, his place shall be filled in like manner, and so on forever; and it shall be the duty of the trustees to fill all other vacancies of their board, as soon after they occur as reasonably and conveniently may be done; and provided further, 623 that, as vacancies shall occur in said board, they shall be so filled that the said board shall, as soon as may be, and forever after, consist of seven clergymen and ten laymen. And the Rev. Heman Humphrey, D. D., is authorized to fix the time and place of the first meeting of the said trustees, and to notify each of them thereof in writing.

SEC. 2. And be it further enacted, that that the said corporation shall have full power and authority to determine, at what time and place their meetings shall be holden, and the manner of notifying the trustees to convene at such meetings; and also, from time to time, to elect a President of said college, and such Professors, 624 Tutors, Instructors and other officers of the said college, as they shall judge most for the interest thereof, and to determine the duties, salaries, emoluments, responsibilities, and tenures of their several offices. And the said corporation are further empowered to purchase or erect, and keep in repair, such houses and other buildings, as they shall judge necessary for the said college; and also to make and ordain, as occasion may require, reasonable rules, orders, and by-laws, not repugnant to the Constitution and Laws of this Commonwealth, with reasonable penalties, for the good government of the said college, and for the regulation of their own body; and also to determine and regulate the course of instruction

in said college, and to confer such degrees as are usually conferred by colleges in New England, except Medical Degrees; provided nevertheless, that no corporate business shall be transacted at any meeting unless nine at least of the trustees are present.

SEC. 3. And be it further enacted, that the said corporation may have a common seal, which they may alter or renew at their pleasure, and that all deeds, sealed with the seal of said corporation and signed by their order, shall, when made in their corporate name, be considered in law as the deeds of said corporation; and that said
625 corporation may sue and be sued in all actions, real, personal, or mixed, and may prosecute the same to final judgment and execution, by the name of the Trustees of Amherst College; and that said corporation shall be capable and holding in fee simple, or any less estate, by gift, grant, bequest, devise, or otherwise, any lands, tenements, or other estate, real or personal; provided, that the clear annual income of the same shall not exceed Thirty Thousand Dollars.

SEC. 4. And be it further enacted, that the clear rents and profits of all the estate, real and personal, of which said corporation shall be seized and possessed, shall be appropriated to the endowment of said college, in
626 such manner as shall most effectually promote virtue and piety, and the knowledge of such of the languages and of the liberal and useful arts and sciences, as shall be directed, from time to time, by the said corporation; they conforming to the will of the donor or donors, in the application of any estate received, which may be given, devised or bequeathed, for any particular object connected with the college.

SEC. 5. And be it further enacted, that the said trustees be and are hereby authorized all the real estate, goods, chattels, choses in action, and property of every description whatever, which has heretofore been given,

conveyed, purchased, bequeathed, devised, or in any other way secured, or engaged to be given, paid, or devised to the Trustees of Amherst Academy, with the intent and for the purpose of establishing and maintaining a classical or collegiate institution in said town; and that all the said funds and estate, as well as all other property which may be received by them, shall be faithfully and and forever used and appropriated according to the will of the donor; provided, that the several acts and contracts of the Trustees of Amherst Academy, relative to the property given for the benefit, and debts incurred by them for the use of the said collegiate institution,
627 shall have full force, and be equally binding upon the Trustees of Amherst College, as they now are on the trustees of said academy.

SEC. 6. And be it further enacted, that no instructor in said college shall ever be required, by the trustees, to propose any particular religious opinions, as a test of office; and no student shall be refused admission to, or denied any privileges, honors or degrees of said college, on account of the religious opinions he may have.

SEC. 7. And be it further enacted, that if it shall hereafter appear to the Legislature of this Commonwealth
. lawful and expedient, to remove Williams to the
628 town of Amherst, and the President and Trustees of Williams College shall agree so to do, the Legislature shall have full power to unite Williams and Amherst Colleges into one University, at Amherst, on such terms and conditions, and under such government, as shall be agreed on by the majority of a board of seven commissioners, of whom two shall be appointed by each of said colleges and three by the joint ballot of the Legislature, or either of them, on the part of Amherst College, shall not be appointed, then the residue of said commissioners shall have full power to proceed in the premises; provided also, that if the said trustees of Amherst Academy shall not, within eight months from the passing of this

act, by a good deed or deeds, assign, convey, and make over to the said Trustees of Amherst College, their successors and assigns, all the real estate, goods, chattels, choses in action, and property, mentioned in the fifth section of this act, to be used and appropriated as is therein provided, this act shall be void.

SEC. 8. And be it further enacted, that the Legislature of this Commonwealth may grant any further powers to, or alter, limit, annul, or restrain any of the powers vested by this act in the said corporation, as shall be judged necessary to promote the best interests of the said
629 college; and, more especially, may appoint and establish overseers or visitors of the said college, with all the necessary powers for the better aid, preservation and government thereof.

Provided, That the granting of this Charter shall never be considered as a pledge on the part of the Government, that pecuniary aid shall hereafter be granted to the college.

In House of Representatives February 21, 1825, this bill having had three several readings passed to be enacted.

630 WILLIAM C. DAVIS,

Speaker.

In Senate February 21, 1825, this bill having had two several readings passed to be enacted.

NASH SILSBEE,

President.

FEBRUARY 21, 1825.

Approved,

MARCUS MORTON.

COMMONWEALTH OF MASSACHUSETTS.

Office of the Secretary.

Boston, Aug. 2, 1901.

A true copy.

Witness the Seal of the Commonwealth.

[SEAL.] W. M. OLIN,

Secretary of the Commonwealth.

CLERK.

Complainants' Exhibit No. 5.

CHARTER OF BOSTON COLLEGE AMENDED.

Mr. Hinckley: I offer in evidence a compiled copy of the charter of Boston College and ask to have the same may marked Complainants' Exhibit No. 5.

Mr. Bowe: Same objection.

The paper was marked Complainants' Exhibit No. 5 June 11th, 1901, C. H.

Exhibit No. 5 is as follows:

(Exhibit 65 of Appendix.)

COMMONWEALTH OF MASSACHUSETTS.

Executive Department.

Boston, January 7, 1901.

I, W. Murray Crane, Governor of the Commonwealth

Exhibit No. 65.

COMMONWEALTH OF MASSACHUSETTS.

In the Year of our Lord, one thousand, seven hundred and Ninety-four.

An Act to establish a College in the town of Brunswick, in the District of Maine within this Commonwealth.

Be it enacted by the Senate and House of Representatives in general court assembled and by the authority
635 of the same, that there be erected and established in the town of Brunswick in the District of Maine, a college for the purpose of educating youth, to be called and known by the name of Bowdoin College, to be under the government and regulation of two certain bodies, politic and corporate, as hereafter in this act is provided.

And be it further enacted by the authority aforesaid, that the Revd. Thomas Brown, Revd. Samuel Dean, D. D., John Frothingham, Esqr., Revd. Daniel Little, Revd. Thomas Lancaster, Honorable Josiah Thatcher and David Mitchel, Esqr., Revd. Tristram Gilman, Revd. Alden Bradford, Thomas Rice, Esqr., and Mr. William Martin, together with the President and Treasurer of
636 the said College for the time being, to be chosen as in this Act is hereafter directed, be and hereby are created a body politic and corporate by the name of the President and Trustees of Bowdoin College, and that they and their successors, and such others as shall be duly elected members of the said corporation, shall be and remain a body politic and corporate by that name forever.

And be it further enacted by the authority aforesaid, that for the more orderly conducting the business of the said corporation, the president and trustees shall have full power and authority from time to time, to elect a vice-president and secretary of the said corporation and to de-

clare the tenures and duties of their respective offices, and also to remove any trustee from the same corporation, when in their judgment he shall be rendered incapable by age or otherwise, of discharging the duties of his office, or shall neglect or refuse to perform the same, and to fill up all vacancies in the said corporation, by electing such persons for trustees as they shall be judge; provided nevertheless that the number of the said trustees, including the president and treasurer of the said college, for the time being, shall never be greater than thirteen nor less than seven.

637 And be it further enacted that the said corporation may have one common seal, which they may change or renew at their pleasure; and that all deeds signed and delivered by the treasurer and sealed with their seal by order of the president and trustees, shall, when made in their corporate name, be considered in law as the deeds of the said corporation; and that the said corporation may sue and be sued in all actions real, personal or mixed; and may prosecute and defend the same to final judgment and execution by the name of the president and trustees of Bowdoin College; and that the said corporation shall be capable of having, holding and taking in fee simple or any less estate, by gift, grant, devise or otherwise, any lands, tenements, or other estate real or personal; provided, nevertheless, that the annual
638 clear income of the same shall not exceed the sum of Ten thousand pounds.

And be it further enacted by the authority aforesaid, that the said corporation shall have full power and authority to determine at what times and places their meetings shall be holden, and on the manner of notifying the trustees to convene at such meetings, and also from time to time to elect a president and treasurer of the said college, and such professors, tutors, instructors and other officers of the said college, as they shall judge most for the interest thereof, and to determine the duties, salaries,

emoluments and tenures, of their several offices aforesaid; (the said president for the time being, when elected and inducted into his office, to be, *ex officio*, president of the said corporation) and also to purchase or erect and keep in repair such houses and other buildings as they shall judge necessary for the said college; and also to make and ordain as occasion may require, reasonable rules, orders, and by-laws, not repugnant to the laws of this Commonwealth, with reasonable penalties for the good government of the said college; and also to determine and prescribe the mode of ascertaining the qualifications of the students requisite to their admission; and also to
639 confer such degrees as are usually conferred by universities established for the education of youth; and a majority of the members of said corporation, present at any legal meeting, shall decide all questions which may properly come before the said trustees; provided, nevertheless, that no corporate business shall be transacted at any meeting, unless seven at least of the trustees are present; and provided, further, that the said corporation shall confer no degrees other than these of Bachelor of Arts and Master of Arts, until the first day of January, which will be in the year of our Lord, one Thousand, eight hundred and ten.

And be it further enacted by the authority aforesaid,
640 that the clear rents, issues and profits of all the estate real and personal of which the said corporation shall be seized or possessed, shall be appropriated to the endowment of the said college in such manner as shall most effectually promote virtue and piety and the knowledge of such of the languages and the useful and liberal arts and sciences as shall hereafter be directed from time to time by the said corporation. And more effectually to provide for the wise and regular government of the fund belonging to it, by establishing a supervising body with proper powers.

Be it further enacted by the authority aforesaid, that

no election made by the said corporation, either of trustees to fill up vacancies, or of president or treasurer of the said college, or of any other officer of the said college, nor any vote or order of the said corporation to remove any trustee, or any officer of the said college, or to purchase or erect any house or other building for the said college, or to determine what officers shall be established for the said college, or the duties, salaries, emoluments or tenures of such offices, or for the appropriation of any of their funds, or monies, or for the acceptance of any estate, when the donation thereof was made upon condition,
or for determining the qualifications for the students
641 requisite to their admission, or for the conferring of
any degrees, or for the making, altering, amending or repealing any rules, orders or by-laws for the government of the said college, shall have any force, effect or validity, until the same shall have been agreed to by the overseers of said Bowdoin College hereinafter in this act created.

And be it further enacted by the authority aforesaid, that the Honorable Josiah Thatcher, Esqr., be, and is hereby authorized and empowered to fix the time and place for holding the first meeting of the said trustees, and to notify each of the said trustees thereof in writing.

And for the establishing of the supervising body
642 with proper powers above mentioned;

Be it further enacted by the authority aforesaid, that Edward Cutts, Thomas Cutts, Simon Frye, David Sewall and Nathan'l Wells, Esqrs., Revd. Moses Hemingway, D. D., Revd. Silas Moody, Revd. John Thompson, Revd. Nath'l Webster, Revd. Samuel Foxcroft, Revd. Caleb Jewett, Revd. Alfred Johnson, Revd. Paul Coffin, Revd. Benjamin Chadwick, Revd. Sam'l Eaton, Revd. Elijah Kellogg, Revd. Ebenezer Williams, Rev. Charles Turner, Daniel Davis, Samuel Freeman, Joshua Fabyan, William Gorham, Stephen Longfellow, Joseph Noyes, Isaac Parsons, Robert Southgate, John Wait, Peleg Wadsworth,

and William Wedgery, Esqrs., Revd. Ezekiel Emerson, Jonathan Ellis, Jonathan Bowman, Edmund Bridge, Daniel Cony, Henry Dearborn, Dummer Sewall, Samuel Thompson, John Dunlap, Francis Winter, Nathaniel Thwing, Alexander Campbell, and Paul Dudley Esqrs., together with the president of the college, and the secretary of the corporation first created in this act, for the time being, be and they are hereby created a body politic and corporate by the name of the Overseers of Bowdoin College, and that they, their successors and such others as shall be duly elected into the said corporation of overseers shall be and remain a body politic and corpo-
643 rate by that name forever.

And be it further enacted by the authority aforesaid, that the members of the said corporation of overseers may have one common seal, which they may change, break and renew at their pleasure, and that they may sue or be sued, prosecute and defend unto final judgment and execution, by the name of the Overseers of Bowdoin College.

And be it further enacted by the authority aforesaid, that for the orderly conducting the business of the said mentioned corporation, the members thereof shall have full power from time to time, as they shall determine, to elect a president, vice-president and secretary, and to
644 fix the tenures and duties of their respective offices, and also to determine at what times and places their meetings shall be holden and upon the manner of notifying the overseers to convene at such meetings, and also to remove any overseer from the said corporation, when in their judgment he shall be rendered incapable by age or otherwise, or shall neglect or refuse to discharge the duties of his office; and also to fill up all vacancies in the said corporation of overseers, by electing such persons for overseers, as they shall judge best qualified therefor; and a majority of the members present at any legal meeting shall decide all questions which may properly come before the said overseers; provided, nevertheless, that the

number of the said overseers including the president of the college, and the secretary of the corporation last above created, shall never be greater than forty-five nor less than twenty-five.

And be it further enacted by the authority aforesaid, that the overseers of said Bowdoin College shall have power to agree or disagree to any election vote, order or act of the president and trustees of said college, where the agreement of the said overseers is made necessary by this act to give force, effect and validity to such election, vote, order or act; and they are hereby directed to notify the said president and trustees of such agreement or disagreement in convenient time thereafter; and the said overseers are also empowered to call upon any treasurer of the said college, his executors and administrators, to render to them a just and true account of all the doings of such treasurer in his said office, so often as the said overseers shall direct. Provided, nevertheless, that no corporate business shall be transacted at any meeting of the overseers aforesaid, unless fifteen of them at least are present.

And be it further enacted by the authority aforesaid, that the treasurer of the said college shall, before he enter upon the execution of the duties of his office, give bond to the said overseers in such penalty and with such sureties as they shall approve of, conditioned for the faithful discharge of the duties of the said office, and for rendering a just and true account of his doings therein when required, and that all the monies, securities, and other property of the president and trustees of Bowdoin College, together with all the books in which his accounts and proceedings as treasurer were entered and kept, that appertain to his office of treasurer as aforesaid shall upon demand made upon him, his executors or administrators, be paid and delivered over to his successor in that office; and all monies to be recovered by virtue of any suit at law upon such bond, shall be paid over to the

president and trustees aforesaid, and subjected to the appropriation above directed in this act.

And be it further enacted by the authority aforesaid, that no trustee of the said college, excepting the president and secretary first above mentioned shall be an overseer of the said college; and if any trustee (excepting as aforesaid) shall be chosen overseer, he shall cease to be a trustee immediately upon his accepting the place of an overseer; and if any overseer of the said college (excepting as aforesaid) shall hereafter be elected a trustee, he shall cease to be an overseer upon his accepting the
647 place of a trustee.

And be it further enacted by the authority aforesaid, that the Honorable David Sewall, Esq., be, and he hereby is, authorized and empowered to fix the time and place of the first meeting of the overseers of said Bowdoin College to notify the said overseers thereof by publishing the same three weeks successively in each of the Portland newspapers; the last publication to be made three weeks at the least before the time fixed for the meeting.

And be it further enacted by the authority aforesaid, that the Legislature of this Commonwealth may grant any further powers to, or alter, limit, annul or re-
648 strain any of the powers by this act vested in the said corporation as shall be judged necessary to promote the best interests of the said college.

And be it further enacted by the authority aforesaid, that there be, and hereby is, granted five townships of land of the contents of six miles square each, to be laid out and assigned from any of the unappropriated lands belonging to this Commonwealth in the District of Maine the same to be vested in the trustees of Bowdoin College and their successors forever, for the use, benefit and purpose of supporting the said college, to be by them holden in their corporate capacity with full power and authority

to settle, divide and manage the same townships or any part thereof, or to sell, convey, and dispose of the same in such way and manner as shall best promote the welfare of said college, the same to be laid out under the direction of the committee for the sale of eastern lands, and a plan or plans thereof returned into the secretary's office, provided the trustees aforesaid or their assigns shall cause to be settled fifteen families in each of said townships within twelve years from the passing of this act. And provided also there shall be reserved in each township three lots of three hundred and twenty acres each for the following uses, viz: one lot for the first settled
649 minister, one lot for the use of the ministry, and one lot for the use of schools in each of said townships.

In the House of Representatives June 24th, 1794, this bill having had three several readings, passed to be enacted.

EDWARD H. ROBBINS,

Speaker.

In Senate June 24th, 1794, this bill having had two several readings, passed to be enacted.

SAML. PHILLIPS,

650 President.

JUNE 24TH, 1794.

By the Governor,

Approved.

SAMUEL ADAMS.

COMMONWEALTH OF MASSACHUSETTS.

Office of the Secretary.

BOSTON, Jan. 7, 1901.

A true copy.

Witness the seal of the Commonwealth.

[SEAL]. WM. M. OLIN,

Secretary of the Commonwealth.

651

Exhibit 66.

CHARTER OF WILLIAMS COLLEGE.

652

Mr. Blaikie: I offer in evidence exemplified copy of the charter of Williams College, and ask that the same be marked Complainants' Exhibit No. 3.

Mr. Bovee: Same objection.

The paper was marked Complainant's Exhibit, No. 3 June 11th, 1901, C. B.

Exhibit No. 3 is as follows:

(Appendix of Exhibits No. 66).

COMMONWEALTH OF MASSACHUSETTS.

Executive Department.

BOSTON, January 7, 1901.

I, W. Murray Crane, Governor of the Commonwealth,

do hereby certify that William M. Olin, whose genuine signature appears to the annexed certificate of authentication, is now, and was at the date of said certificate, Secretary of the Commonwealth, duly elected and qualified; that all his official acts as such are entitled to full faith and credit; that his said certificate is in due form of law; and that the seal thereto attached is the genuine seal of the Commonwealth.

Given under my hand at Boston this seventh day of January, in the year 1901.

W. MURRAY CRANE,

653 Governor.

Exhibit No. 66.

COMMONWEALTH OF MASSACHUSETTS.

Office of the Secretary.

BOSTON, January 7, 1901.

I, William M. Olin, Secretary of the Commonwealth, do hereby certify that W. Murray Crane, whose genuine signature appears to the foregoing certificate of attestation, is now, and was at the date of said certificate,
654 the Governor of the Commonwealth of Massachusetts, duly elected by lawful authority and legally qualified thereto.

In testimony of which I have hereunto affixed the seal of the Commonwealth, in my official custody and possession.

[SEAL]. W. M. OLIN,

Secretary of the Commonwealth.

Exhibit No. 66.

COMMONWEALTH OF MASSACHUSETTS.

In the year of our Lord one thousand seven hundred and ninety-three.

An act to establish a college in the County of Berkshire within this Commonwealth, by the name of Williams College.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, that there be erected and established in the town of Williamstown in the County of Berkshire, a college for the purpose of educating youth, to be called and known by the name of Williams College, to be under the government and regulation of a body politic and corporate as hereafter in this act is provided,

655

And be it further enacted by the authority aforesaid, that John Bacon, Esquire, Reverend Daniel Collins, Israel Jones, Woodbridge Little, David Noble, Theodore Sedgwick, Tompson J. Skinner, Esquires, Reverend Seth Swift, Henry Vansaack, Esquires, Reverend Stephen West, Doctor of Divinity, William Williams and Elijah Williams, Esquires, together with the president of the said college for the time being, to be chosen as in this act hereafter directed, be and hereby are created a body politic and corporate by the name of the President and Trustees of Williams College, and that they and their successors and such others as shall be duly elected members of the said corporation, shall be and remain a

655 body politic and corporate by that name forever.

And be it further enacted by the authority aforesaid, that for the more orderly conducting the business of the said corporation the president and trustees shall have full power and authority, from time to time, as they shall determine, to elect a vice-president and secretary of the said corporation and to declare the tenures and duties of their respective offices, and also to remove any trustee from the same corporation when, in their judgment, he shall be rendered incapable, by age or otherwise, of discharging the duties of his office, or shall neglect or refuse to perform the same, and to fill up all vacancies in the said cor-

poration, by electing such persons for trustees as they shall judge best; provided, nevertheless, that the number of the said trustees, including the president of the said college for the time being, shall never be greater than seventeen, nor less than eleven.

And be it further enacted, that the said corporation may have one common seal, which they may change, break or renew at their pleasure; and that all deeds signed and delivered by the treasurer, and sealed with their seal by order of the president and trustees shall, when made in their corporate name, be considered in
657 law as the deed of the said corporation; and that the said corporation may sue and be sued in all actions, real, personal or mixed, and may prosecute and defend the same to final judgment and execution, by the name of the president and trustees of Williams College; and that the said corporation shall be capable of having, holding and taking in fee simple, or any less estate by gift, grant, devise, or otherwise, any lands, tenements, or other estate, real or personal; provided, nevertheless, that the annual clear income of the same shall not exceed the sum of Six Thousand pounds.

And be it further enacted by the authority aforesaid,
658 that the said corporation shall have full power and authority to determine at what times and places their meetings shall be holden, and on the manner of notifying the trustees to convene at such meetings; and also, from time to time, to elect a president and treasurer of said college, and such professors, tutors, instructors and other officers of the said college as they shall judge most for the interest thereof, and to determine the duties, salaries, emoluments and tenures of their several offices aforesaid; the said president for the time being, when elected and inducted into his office, to be *ex officio*, president of the said corporation; and the said corporation are further impowered to purchase or erect and keep in repair, such houses and other buildings as they shall judge necessary

for the said college; and also to make and ordain, as occasion may require, reasonable rules, orders and by-laws, not repugnant to the laws of this Commonwealth, with reasonable penalties for the good government of the said college; and also to determine and prescribe the mode of ascertaining the qualifications of the students requisite to their admission; and also to confer such degrees as are usually conferred by universities established for the education of youth; provided, nevertheless, that no corporate business shall be transacted at any meeting unless seven at the least of the trustees are present; and provided further, that the said corporation shall con-
659 fer no degrees other than those of Bachelor of Arts and Master of Arts until after the first day of January, which will be in the year of our Lord one thousand and eight hundred.

And be it further enacted by the authority aforesaid, that the clear rents, issues and profits of all the estate, real and personal, of which the said corporation shall be seized or possessed, shall be appropriated to the endowment of the said college, in such manner as shall most effectually promote virtue and piety, and the knowledge of such of the liberal arts and sciences as shall hereafter be directed, from time to time, by the said corporation.

660 And be it further enacted by the authority aforesaid, that the Honorable Tompson J. Skinner, Esquire, be, and he is, hereby authorized, impowered to fix the time and place for holding the first meeting of the said corporation, of which he shall give notice, by an advertisement in the Stockbridge newspapers, at least fourteen days previous thereto.

And be it further enacted by the authority aforesaid, that the treasurer of the said college shall, before he enter upon the execution of the duties of his office, give bonds to the said corporation in such sums and with such sureties as they shall approve of, conditioned for the

faithful discharge of the said office, and for rendering a just and true account of his doings therein when required; and that all the money, securities and other property of the president and trustees of Williams College, together with all the books in which his accounts and proceedings as treasurer were entered and kept, that shall be in his hands at the expiration of his office shall, upon demand made upon him, his executors or administrators, be paid and delivered over to his successor in that office; and all monies recovered by virtue of any suit at law upon such bond shall be subjected to the appropriation above directed in this act.

661

And be it further enacted by the authority aforesaid, that the Legislature of this Commonwealth may grant any further powers to, or alter, limit, annul, or restrain any of the powers by this act vested in the said corporation, as shall be judged necessary to promote the best interests of the said college; and more especially, may appoint and establish overseers, or visitors, of the said college, with all necessary powers and authorities for the better aid, preservation and government thereof.

And be it further enacted by the authority aforesaid, that all the property, real and personal, belonging to the trustees of Williamstown Free School, be, and the same hereby is, vested in the corporation, which by this
662 act is created.

And be it further enacted by the authority aforesaid, that there be and hereby is granted to the trustees of Williams College for the use, benefit, and purpose of supporting said college, Twelve hundred pounds, to be paid out of the treasury of this Commonwealth; Three hundred pounds of the same to be paid the first day of September one thousand seven hundred and ninety-three; and Three hundred pounds annually, on the first day of September, for three succeeding years.

In the House of Representatives June 22d, 1793, this bill having had three several readings, passed to be enacted.

WM. TUDOR,

Sp. *pro temp.*

In Senate June 22d, 1793, this bill having had two several readings, passed to be enacted.

SAML. PHILLIPS,

663 President.

Approved June 22d, 1793.

JOHN HANCOCK.

COMMONWEALTH OF MASSACHUSETTS.

Office of the Secretary.

BOSTON, Jan. 7, 1901.

A true copy.

Witness the seal of the Commonwealth.

[SEAL]. WM. N. OLIN,

664 Secretary of the Commonwealth.

Exhibit 67.

Mr. Blaikie: I offer in evidence exemplified copy of the charter of Dartmouth College, and ask that it be marked Complainants' Exhibit No. 4.

Mr. Bovee: Same objection.

The paper was marked Complainants' Exhibit No. 4, June 11th, 1901, C. B.

Exhibit No. 4 is as follows:

(Appendix of Exhibits No. 67.)

George the Third by the grace of God of Great Britain, France and Ireland, king defender of the faith and so forth.

665 To all to whom these presents shall come,

Greeting:

Whereas, it hath been represented to our trusty and well beloved John Wentworth, Esqr., Governor and Commander in chief in and over our Province of New Hampshire, in New England, in America, That the Reverend Eleazer Wheelock of Lebanon, in the colony of Connecticut, in New England aforesaid, now Doctor in Divinity, did on or about the year of our Lord one thousand seven hundred and fifty-four, at his own expense on his own estate and plantation, set on foot an Indian Charity School, and for several years through the assistance of well disposed persons in America, clothed, maintained and educated a number of the children of the Indian natives

666 with a view to their carrying the gospel in their own language and spreading the knowledge of the great Redeemer among their savage tribes, and hath actually employed a number of them as missionaries and schoolmasters in the wilderness for that purpose, and by the blessing of God upon the endeavors of said Wheelock, the design became reputable among the Indians in so much that a larger number desired the education of their children in said school, and were also disposed to receive missionaries and schoolmasters in the wilderness more than could be supported by the charitable contributions in those American colonies. Whereupon the said Eleazer Wheelock tho't it expedient that endeavors should be

used to raise contributions from well disposed persons in England for the carrying on and extending said undertaking, and for that purpose the said Eleazer Wheelock requested the Reverend Nathaniel Whitaker, now Doctor in Divinity, to go over to England for that purpose, and sent over with him the Reverend Samson Occum, an Indian minister who had been educated by the said Wheelock. And to enable the said Whitaker to the more successful performance of said work on which he was sent, said Wheelock gave him full power of attorney by which said Whitaker solicited those worthy and generous contributors to the charity, viz.: The Right Honorable
667 William Earl of Dartmouth, the Honorable Sir Sidney Stafford Smythe Knight, one of the Barons of His Majesty's Court of Exchequer, John Thornton of Clapham, in the County of Surrey, Esqr., Samuel Roffey of Lincoln's Infields in the County of Middlesex, Esqr., Charles Hardy of the Parish of Saint Marylebonne in said County, Esqr., Daniel West of Christ Church, Spitafields in the County aforesaid, Esqr., Samuel Savage of the same place, Gentleman Josiah Roberts of the Parish of Saint Edmund the King, Lombart Street, London; Gentleman and Robert Keen of the Parish of St. Botolph Oldgate, London, Gentleman, to receive the several sums of money which should be contributed, and to be trustees for the contributors to such charity, which they
668 cheerfully agreed to. Whereupon the said Whitaker did by virtue of said power of attorney constitute and appoint the said Earl of Dartmouth, Sir Sidney Stafford Smythe, John Thornton, Samuel Roffey, Charles Hardy and Daniel West, Esqrs., and Samuel Savage, Josiah Roberts and Robt. Keen, Gentlemen, to be trustees of the money which had then been contributed and which should by his means be contributed for said purpose, which trust they have accepted as by their engrossed declaration of the same under their hands and seals well executed fully appears and the same has also been ratified by a deed of trust well executed by the said Wheelock. And the said Wheelock further represents that he has by

power of attorney for many weighty reasons given full power to the said trustees to fix upon and determine the place for said school most subservient to the great end in view, and to enable them understandingly to give the preference the said Wheelock has laid before the said trustees the several offers which have been generously made in the several governments in America to encourage and invite the settlement of said school among them for their own private emoluments and the increase of learning in their respective places as well as for the furtherance of the general design in view.

669 And whereas a large number of the proprietors of lands in the western part of this our Province of New Hampshire, animated and excited thereto by the generous example of his excellency their Governor and by the liberal contributions of many noblemen and gentlemen in England, and especially by the considerations that such a situation would be as convenient as any for carrying on the great design among the Indians, and also considering that without the least impediment to the said design the same school may be enlarged and improved to promote learning among the English and be a means to supply a great number of churches and congregations which are likely soon to be found in that new country with a learned and orthodox ministry, they the said proprietors have promised large tracts of land for the uses afore-
670 said, provided the school shall be settled in the western part of our said province. And they, the said Right Honorable and Worthy Trustees before mentioned, having maturely considered the reasons and arguments in favor of the several places proposed, have given the preference to the western part of our said province lying on Connecticut river, as a situation most convenient for said school, and the said Wheelock has further represented a necessity of a legal incorporation in order to the safety and well being of said seminary and its being capable of the tenure and disposal of lands and bequests for the use of the same. And the said Wheelock has also represented

that for many weighty reasons it will be expedient at least in the infancy of said institution or till it can be accommodated in that new country and he and his friends be able to remove and settle by and round about it that the gentlemen whom he has already nominated in his last will (which he has transmitted to the aforesaid Gentlemen of the Trust in England), to be trustees in America should be of the corporation now proposed. And also as there are already large collections for said school in the hands of the aforesaid Gentlemen of the Trust in England, and all reason to believe from their singular wisdom, piety and zeal to promote the Redeemer's cause (which has
671 already procured for them the utmost confidence of the Kingdom), we may expect they will appoint successors in time to come who will be men of the same spirit whereby great good may and will accrue many ways to the institution and much be done by their example and influence to encourage and facilitate the whole design in view, for which reasons said Wheelock desires that the trustees aforesaid may be vested with all that power therein which can consist with their distance from the same.

Know ye, therefore, that we considering the premises and being willing to encourage the laudable and charitable design of spreading Christian knowledge among
672 the savages of our American wilderness, and also that the best means of education be established in our province of New Hampshire for the benefit of said province, do of our special grace, certain knowledge and mere motion by and with the advice of our council for said province by these presents will, ordain, grant and constitute that there be a college erected in our said province of New Hampshire by the name of Dartmouth College, for the education and instruction of youth of the Indian tribes in this land in reading, writing and all parts of learning which shall appear necessary and expedient for civilizing and christianizing children of pagans as well as in all liberal arts and sciences, and also of English

youth and any others; and the trustees of said college may and shall be one body corporate and politic in deed, action and name and shall be called, named and distinguished by the name of the Trustees of Dartmouth College.

And further, we have willed, given, granted, constituted and ordained and by this our present charter of our special grace certain knowledge and mere motion with the advice aforesaid, do for us, our heirs and successors forever will give, grant, constitute and ordain that there shall be in the said Dartm. College from henceforth
673 and forever a body politick consisting of trustees of said Dartmouth College, and for the more full and perfect erection of said corporation and body politick consisting of Trustees of Dartmouth College, we of our special grace, certain knowledge and mere motion do by these presents for us, our heirs and successors, make, ordain, constitute and appoint our trusty and well beloved Jno. Wentworth, Esqr., Governor of our said Province and the Governor of our said Province of New Hampshire, for the time being, and our trusty and well beloved Theodore Atkinson, Esqr., now president of our council of our said province, George Jaffery and Daniel Pierce, Esqrs., both of our said council, and Peter Gilman, Esqr., now Speaker of our House of Representatives in said
674 province, and William Pitkin, Esqr., one of the Assistants of our Colony of Connecticut, and our said trusty and well beloved Eleazer Wheelock, of Lebanon, Doctor in Divinity, Benjamin Pomroy, of Hebron, James Lockwood of Weathersfield, Timothy Pitkin and John Smalley of Farmington, and William Patten of Hartford, all of our said colony of Connecticut, ministers of the Gospel (the whole number of said trustees consisting and hereafter forever to consist of twelve, no more), to be trustees of said Dartmouth College in this our province of New Hampshire.

And we do further of our special grace, certain knowl-

edge and mere motion for us, our heirs and successors, will, give, grant and appoint that the said trustees and their successors shall forever hereafter be in deed, act and name a body corporate and politick, and that they the said body corporate and politick shall be known and distinguished in all deeds, grants, bargains, sales, writings, evidences or otherwise howsoever, and in all courts forever hereafter plead and be impleaded by the name of the Trustees of Dartmo. College, and that the said corporation by the name aforesaid shall be able and in law capable for the use of said Dartmo. College to have, get, acquire, purchase, receive, hold, possess and enjoy ten
675 ements, hereditaments, jurisdictions and franchises for themselves and their successors in fee simple or otherwise, howsoever, and to purchase, receive or build any house or houses, or any other buildings as they shall think needful and convenient for the use of said Dartmo. College, and in such town in the western part of our said province of New Hampshire, as shall by said trustees or the major part of them be agreed on, their said agreement to be evidenced by an instrument in writing under their hands ascertaining the same. And also to receive and dispose of any lands, goods, chattels and other things of what nature soever, for the use aforesaid and also to have, accept and receive any rents, profits, annuities, gifts, legacies, donations or bequests of any kind
676 whatsoever for the use aforesaid, so nevertheless that the yearly value of the premises do not exceed the sum of six thousand pounds sterling, and therewith or otherwise to support and pay as the said trustees or the major part of such of them as are regularly convened for that purpose and shall agree the president, tutors and other officers and ministers of said Dartmo. College, and also to pay all such missionaries and schoolmasters as shall be authorized, appointed and employed by them for civilizing and christianizing and instructing the Indian natives of this land, their several allowances and also their respective annual salaries or allowances, and all such necessary and contingent charges as from time to

time shall arise and accrue relating to the said Dartmouth College, and also to bargain, sell, let, set or assign lands, tenements or hereditaments, goods or chattels and all other things whatsoever by the name aforesaid in as full and ample a manner to all intents and purposes as a natural person or other body politick or corporate is able to do by the laws of our Realm of Great Britain or of said province of New Hampshire. And further of our special grace, certain knowledge and mere motion to the intent that our said corporation and body politick may answer the end of their erection and constitution and may have perpetual succession and continuance forever; we do
677 for us, our heirs and successors, will, give and grant unto the trustees of Dartmouth College and to their successors forever that there shall be once a year and every year a meeting of said trustees held at said Dartmo. College at such time as by said trustees, or the major part of them, at any legal meeting of said trustees shall be agreed on, the first meeting to be called by the said Eleazer Wheelock as soon as conveniently may be within one year next after the enrollment of these our Letters Patent, at such time and place as he shall judge proper, and the said trustees or the major part of any seven or more of them shall then determine on the time for holding the annual meeting aforesaid, which may be alter'd as they shall hereafter find most convenient.

678

And we further order and direct that the said Eleazer Wheelock shall notify the time for holding said first meeting to be called as aforesaid by sending a letter to each of said trustees, and causing an advertisement thereof to be printed in the New Hampshire Gazette and in some publick news paper printed in the colony of Connecticut, but in case of the death or incapacity of the said Wheelock, then such meeting to be notified in manner aforesaid by the Governor or Commander in chief of our said province for the time being.

And we do also for us, our heirs and successors hereby

will, give and grant unto the said trustees of Dartmouth College aforesaid and to their successors forever, that when any seven or more of the said trustees or their successors are convened and met together for the service of said Dartmo. College at any time or times, such seven or more shall be capable to act as fully and amply to all intents and purposes as if all the trustees of said college were personally present. And all affairs and actions whatsoever under the care of the said trustees shall be determined by the majority or greater number of those seven or more trustees so conven'd and met together.

679 And we do further will, ordain and direct that the president, trustees, professors, tutors and all such officers as shall be appointed for the publick instruction and government of said college shall before they undertake the execution of their respective offices or trusts, or within one year after, take the oaths and subscribe the declaration provided by an Act of Parliament made in the first year of King George the First, entitled, "An act for the further security of his Majesty's Person and Government and the succession of the Crown in the Heirs of the late Princess Sophia being Protestants, and for the extinguishing the hopes of the pretended Prince of Wales and his open and Secret Abettors"; that is to say, the President before the Governor of our said province for the time being or by one by him impowered to that
680 service or by the president of our said council and the trustees, professors, tutors and other officers before the president of said college for the time being who is hereby impowered to administer the same, an entry of all which shall be made in the Record of said college.

And we do for us, our heirs and successors hereby will, give and grant full power and authority to the president hereafter by us named and to his successors, or in case of his failure to any three or more of the said trustees, to appoint other occasional meetings from time to time of the said seven trustees or any greater number of them, to

transact any matter or thing necessary to be done before the next annual meeting, and to order notice to the said seven or any greater number of them of the times and places of meeting for the service aforesaid by a letter under his or their hands of the same one month before said meeting, provided always that no standing rule or order be made or alter'd for the regulation of said college, nor any president or professor be chosen or displaced, nor any other matter or thing transacted or done which shall continue in force after the then next annual meeting of the said trustees as aforesaid.

681 And further we do by these presents for us, our heirs and successors create, make, constitute, nominate and appoint our trusty and well beloved Eleazer Wheelock, Doctor in Divinity, the founder of said college, to be president of said Dartmo. College and to have the immediate care of education and government of such students as shall be admitted into said Dartmouth College for instruction and education.

And do will, give and grant to him in said office full power, authority and right to nominate, appoint, constitute and ordain by his last will such suitable and meet person or persons as he shall choose to succeed him in the presidency of said Dartmo. College, and the person so appointed by his last will to continue in office vested
682 with all the powers, privileges, jurisdiction and authority of a president of said Dartmouth College; that is to say, so long and until such appointment by said last will shall be disapproved by the trustees of said Dartmouth College.

And we do also for us, our heirs and successors, will, give and grant to the said trustees of said Dartmo. College, and to their successors forever, or any seven or more of them convened as aforesaid, that in case of the ceasing or failure of a president by any means whatsoever, that the said trustees do elect, nominate and appoint such

qualified person as they or the major part of any seven or more of them convened for that purpose as above directed, shall think fit to be president of said Dartmo. College, and to have the care of the education and government of the students as aforesaid, and in case of the ceasing of a President as aforesaid, the senior professor or tutor being one of the trustees, shall exercise the office of a president until the trustees shall make choice of and appoint a president as aforesaid. And such professor or tutor or any three or more of the trustees shall immediately appoint a meeting of the body of the trustees for the purpose aforesaid.

683 And also we do will, give and grant to the said trustees convened as aforesaid, that they elect, nominate and appoint so many tutors and professors to assist the president in the education and government of the students belonging thereto as they, the said trustees, shall from time to time and at any time think needful and serviceable to the interests of said Dartmouth College, and also that the said trustees or their successors or the major part of any seven or more of them convened for that purpose as above directed, shall at any time displace and discharge from the service of said Dartmouth College any or all such officers and elect others in their room and stead, as before directed. And also that the said trustees or their successors or the major part of any seven of
684 them which shall convene for that purpose as above directed, do from time to time as occasion shall require elect, constitute and appoint a treasurer, a clerk, an usher and a steward for the said Dartmouth College, and appoint to them and each of them their respective business and trusts and displace and discharge from the service of said college such treasurer, clerk, usher or steward, and to elect others in their room and stead, which officers so elected as before directed we do for us, our heirs and successors by these presents constitute and establish in their several offices, and do give to each and every of them full power and authority to exercise the same in said Dartmo. College according to the directions

and during the pleasure of the said trustees as fully and freely as any like officers in any of our universities, colleges or seminaries of learning in our realm of Great Britain lawfully may or ought to do. And also that the said trustees and their successors or the major part of any seven or more of them which shall convene for that purpose as is above directed as often as one or more of said trustees shall die or by removal or otherwise shall according to their judgment become unfit or incapable to serve the interests of said college, do as soon as may be after the death, removal or such unfitness or incapacity of such trustee or trustees, elect and appoint such
685 trustee or trustees as shall supply the place of him or them so dying or becoming incapable to serve the interests of said college, and every trustee so elected and appointed shall by virtue of these presents and such election and appointment be vested with all the powers, privileges which any of the other trustees of said college are hereby vested with.

And we do further will, ordain and direct that from and after the expiration of two years from the enrollment of these presents such vacancy or vacancies as may or shall happen by death or otherwise in the aforesaid number of trustees shall be filled up by election as aforesaid, so that when such vacancy or vacancies shall be filled
686 up unto the complete number of twelve trustees, eight of the aforesaid whole number of the body of trustees shall be resident and respectable freeholders of our said province of New Hampshire, and seven of said whole number shall be laymen.

And we do further of our special grace certain knowledge and mere motion will, give and grant unto the said trustees of Dartmouth College that they and their successors or the major part of any seven of them which shall convene for that purpose, as is above directed, may make and they are hereby fully impowered from time to time fully and lawfully to make and establish such ordi-

nances, orders and laws as may tend to the good and wholesome government of the said college, and all the students and the several officers and ministers thereof, and to the publick benefit of the same not repugnant to the laws and statutes of our Realm of Great Britain or of this our province of New Hampshire, and not excluding any person of any religious denomination whatsoever from free and equal liberty and advantage of education, or from any of the liberties and privileges or immunities of the said college on account of his or their speculative sentiments in religion, and of his or their being of a religious profession different from the said trustees of
687 the said Dartmo. College, and such ordinances, orders and laws which shall as aforesaid be made. We do for us, our heirs and successors by these presents ratify, allow of and confirm as good and effectual to oblige and bind all the students and the several officers and ministers of the said college. And we do hereby authorize and empower the said trustees of Dartmo. College and the president, tutors and professors by them elected and appointed as aforesaid, to put such ordinances, orders and laws in execution to all proper intents and purposes.

And we do further of our special grace, certain knowledge and mere motion will, give and grant unto the said trustees of said Dartmo. College for the encourage-
688 ment of learning and animating the students of said college to diligence and industry and a laudable progress in literature, that they and their successors, or the major part of any seven or more of them convened for that purpose as above directed, do by the president of said college for the time being, or any other deputed by them, give and grant any such degree or degrees to any of the students of the said college or any others by them tho't worthy thereof as are usually granted in either of the universities or any other college in our Realm of Great Britain. And that sign and seal, diplomas or certificates of such graduations to be kept by the graduates as perpetual memorials and testimonials thereof.

And we do further of our special grace, certain knowledge and mere motion by these presents for us, our heirs and successors give and grant unto the trustees of said Dartmo. College and to their successors that they and their successors shall have a common seal under which they may pass all diplomas or certificates of degrees and all other affairs and business of and concerning the said college which shall be engraven in such a form and with such an inscription as shall be devised by the said trustees for the time being or by the major part of any seven or more of them convened for the service of the said college as is above directed.

689

And we do further for us, our heirs and successors, give and grant unto the said trustees of the said Dartmo. College and their successors or to the major part of any seven or more of them convened for the service of the said college, full power and authority from time to time to nominate and appoint all other officers and ministers which they shall think convenient and necessary for the service of the said college not herein particularly named or mentioned, which officers and ministers we do hereby empower to execute their offices and trusts as fully and freely as any of the officers and ministers in our universities or colleges in our Realm of Great Britain lawfully may or ought to do. And further that the generous

690 contributors to the support of this design of spreading the knowledge of the only true God and Saviour among the American savages may from time to time be satisfied that their liberalities are faithfully disposed of in the best manner for that purpose, and that others may in future time be encouraged in the exercise of the like liberality for promoting the same pious design it shall be the duty of the president of said Dartmo. College and of his successors annually or as often as he shall be thereunto desir'd or required to transmit to the Right Honorable and Worthy Gentlemen of the trust in England before mentioned, a faithful account of the improvm't and disbursements of the several sums he shall

receive from the donations and bequests made in England thro' the hands of said trustees. And also advise them of the general plans laid and prospects exhibited as well as a faithful account of all remarkable occurrences in order if they shall think expedient they may be published. And this to continue so long as they shall perpetuate their board of trust and there shall be any of the Indian natives remaining to be proper objects of that charity.

And lastly our express will and pleasure is and we do by these presents for us, our heirs and successors give and grant unto the said trustees of Dartmo. College and
691 to their successors forever, that these our Letters Patent, or the enrollment thereof in the secretary's office of our province of New Hampshire aforesaid shall be good and effectual in the law to all intents and purposes against us, our heirs and successors without any other license, grant or confirmation from us, our heirs and successors hereafter by the said trustees to be had and obtained notwithstanding the not writing or mis-recital, not naming or mis-naming the aforesaid officers, franchises, privileges, immunities or other the premises or any of them, and notwithstanding a writ of *ad quod damnum* hath not issued forth to enquire of the premises or any of them before the ensealing hereof any statute, act, ordinance or provision, or any other matter or thing
692 to the contrary notwithstanding, to have and to hold all and singular the privileges, advantages, liberties, immunities and all other the premises herein and hereby granted or which are meant, mentioned or intended to be herein and hereby given and granted unto them the said trustees of Dartmouth College, and to their successors forever.

In testimony whereof we have caused these our letters to be made patent and the publick seal of our said province of New Hampshire to be hereunto affixed. Witness our trusty and well-beloved John Wentworth, Esqr., Governor and Commander in Chief in and over our said

province, &c., this 13th day of December, in the 10th year of our reign and in the year of our Lord, 1769.

N. B. The words "and such professor or tutor or any three or more of the trustees shall immediately appoint a meeting of the body of the trustees for the purpose aforesaid," between the first and second lines, also the words "or more" between the twenty-seventh and twenty-eighth lines, also the words "or more" between the twenty-eighth and twenty-ninth lines, and also the words "to all intents and purposes" between the thirty-seventh and thirty-eighth lines of this sheet were respectively
693 interlined before signing and sealing.

By his Excellency's Command with advice of Council.

THEODORE ATKINSON,

Secr'y.

J. [L. S.] WENTWORTH.

Province of New Hampshire, Decemr. 18th, 1769.

Recorded according to the original Patent under the Province Seal.

694 Attr. GEO. KING,

Depy. Secy.

"STATE OF NEW HAMPSHIRE.

Office of Secretary of State.

I hereby certify that the foregoing is a true copy of the Dartmouth College charter as recorded in Volume Four of the Charter Records in this office.

In testimony whereof I hereunto subscribe my offi-
[SEAL] cial signature and affix the seal of the State at Concord, this seventh day of January, A. D., 1901.

EDWARD N. PEARSON,

Secretary of State."

695

Exhibit 68.

CHARTER OF COLUMBIA COLLEGE.

Mr. Blaikie: I offer in evidence exemplified copy of the charter of Columbia College and ask that it be marked Complainants' Exhibit No. 5.

Mr. Bovee: Same objection.

The paper was marked Complainants' Exhibit No. 5. June 11th, 1901, C. B.

Complainants' Exhibit No. 5 is as follows:

696

(Appendix of Exhibits No. 68).

THE ORIGINAL CHARTER OF COLUMBIA COLLEGE.

GEORGE THE SECOND, by the grace of God, of Great Britain, France and Ireland, King, Defender of the Faith, etc. To all to whom these presents shall come, greeting:

Whereas, by several acts of the Governour, Council and General Assembly of our Province of New York, divers sums of money have been raised by publick lotteries, and

appropriated for the founding, erecting and establishing a college in our said government, for the education and instruction of youth in the liberal arts and sciences.

And whereas the Rector and inhabitants of the City of New York, in Communion of the Church of England, as by law established, for the encouraging and promoting the same good design, have sett apart a parcel of ground for that purpose, of upwards of Three Thousand Pounds value, belonging to the said corporation, on the west side of the broadway, in the west ward of our city of New
York, fronting easterly to Church street, between
697 Barclay street and Murray street, four hundred and
forty foot; and from thence running westerly, between and along the said Barclay street and Murray street to the North River; and also, a street from the middle of the said land, easterly to the Broadway of ninety foot, to be called Robinson street, and have declared that they are ready and desirous to convey the said land in fee to and for the use of a college intended and proposed to be erected and established in our said province upon the terms in their said declaration mentioned.

And whereas our loving subjects, the trustees appointed
in and by an act of the Governor, Council and Gen-
698 eral Assembly of our said Province of New York, en-
titled an act for vesting in trustees the sum of Three Thousand Four Hundred and Forty-three Pounds, eighteen shillings, by way of lottery, for erecting a college within this colony, esteeming the said lands offered and sett apart by the said Rector and inhabitants of the city of New York, in Communion of the Church of England, as by law established, the most convenient place for the building, erecting and establishing a college in our said province, have by their humble petition presented to our trusty and well-beloved James DeLancey, Esq., our Lieutenant Governor and Commander in Chief of our said province of New York, in council, prayed our letters

patent of incorporation for the better establishing, erecting and building a college on the said lands, and the more effectually governing, carrying on and promoting the same, and instructing of youth in the liberal arts and sciences; wherefore, wee, being willing to grant the reasonable request and desire of our said loving subjects, and to encourage the said good design of promoting a liberal education among them, and to make the same as beneficial as may be, not only to the inhabitants of our said province of New York, but to all our colonies and territories in America; Know ye, that wee, considering the premises, do, of our special grace, certain knowledge
699 and mere motion by these presents will, grant, constitute and ordain, that when, and as soon as the said Rector and inhabitants of the city of New York in Communion of the Church of England, as by law established, shall legally convey and assure the said hereinbefore mentioned lands to the corporation or body politick erected and made by these our letters patent, that there be erected and made on the said lands, a college, and other buildings and improvements, for the use and convenience of the same, which shall be called and known by the name of King's College, for the instruction and education of youth in the learned languages and liberal arts and sciences; and that in consideration of such grant to be made by the Rector and inhabitants of the city of
700 New York, in Communion of the Church of England, as by law established, the president of the said college, for the time-being, shall forever hereafter be a member of and in communion with the Church of England, as by law established; and that the governors of the said college and their successors forever shall be one body corporate and politick, in deed, fact and name, and shall be called, named and distinguished by the name of the Governors of the College of the Province of New York, in the City of New York, in America, and them and their successors, by the name of the Governors of the College of the Province of New York, in the City of New York, in America, one body corporate and politick, in deed, fact

and name, really and fully, we do for us, our heirs and successors, erect, ordain, make, constitute, declare and create by these presents, and by that name they shall and may have perpetual succession. And we do for us, our heirs and successors, for the continuance and better establishment of the said college, will, give, grant, ordain, constitute and appoint, that in the said college, to be erected and built upon the lands aforesaid, there shall from henceforth forever be a body corporate and politick, consisting of the Governors of the College of the Province of New York, in the City of New York, in America; and

for the more full and perfect erection of the said cor-
701 poration and body politick, consisting of the Governors of the College of the Province of New York, in the City of New York, in America, we do will, grant, ordain, constitute, assign, limitt and appoint by these presents, the Most Reverend Father in God, our trusty and well beloved Thomas, Lord Archbishop of Canterbury, and the Most Reverend the Lord Archbishop of Canterbury for the time-being; the Right Honorable Dunk, Earl of Halifax, first Lord Commissioner for Trade and Plantations, and the first Lord Commissioner for Trade and Plantations for the time-being; our now Lieutenant Governor and Commander in Chief of our said Province of New York, and the Governor or Commander in Chief

of our said Province for the time being; the eldest
702 Councilor of our said Province now and for the time-being; the Judges of our Supreme Court of Judicature of our said Province now and for the time-being; the Secretary of our said Province now and for the time-being; the Attorney General of our said Province now and for the time-being; the Speaker of the General Assembly of our said Province now and for the time-being; the Treasurer of our said Province now and for the time-being; the Mayor of our City of New York, in our said Province, now and for the time-being; the Rector of Trinity Church in our said City of New York now and for the time-being; the Senior Minister of the Reformed Protestant Dutch Church in our said city now and for the

time being; the Minister of the Ancient Lutheran Church in our said city now and for the time being; the Minister of the French Church in our said city now and for the time being; the Minister of the Presbyterian congregation in our said city, for the time being; the President of the said College, appointed by these presents, and the President of the said College for the time being, to be chosen as hereinafter is directed, and twenty-four other persons, who shall be called and named, and are hereby called and named, the Governors of the College of the Province of New York, in the City of New York, in America; and for that purpose we have elected, nom-
703 inated, ordained, constituted, limited and appointed, and by these presents do, for us, our heirs, and successors, elect, nominate, ordain, constitute, limit and appoint the said Most Reverend Father in God, Thomas, Lord Archbishop of Canterbury, and the Lord Archbishop of Canterbury for the time being, the Right Honorable Dunk, Earl of Halifax, First Lord Commissioner for Trade and Plantations, and the First Lord Commissioner for Trade and Plantations for the time being: our now Lieutenant Governor and Commander in Chief of our Province of New York, and the Governor or Commander in Chief of our said Province for the time being; the eldest Councilor of our said Province, now and for the time being; the Judges of the Supreme Court of Judica-
704 ture of our said Province, now and for the time being; the Secretary of our said Province, now and for the time being; the Attorney General of our said Province, now and for the time being; the Speaker of the General Assembly of our said Province, now and for the time being; the Treasurer of our said Province, now and for the time being; the Mayor of our said City of New York, now and for the time being; the Rector of Trinity Church in our said city, now and for the time being; the Senior Minister of the Reformed Protestant Dutch Church in our said city, now and for the time being; the Minister of the Ancient Lutheran Church in our said city, now and for the time being; the Minister of the French

Church in our said city, now and for the time-being; the Minister of the Presbyterian Congregation in our said city, for the time-being; the President of the said College, appointed by these presents, and the President of the said college for the time being; and Archibald Kennedy, Joseph Murray, Josiah Martin, Paul Richard, Henry Cruger, William Walton, John Watts, Henry Beekman, Philip VerPlank, Frederick Pjilipse, Joseph Robinson, John Cruger, Oliver DeLancey, James Livingston, Esquires, Benjamin Nicoll, William Livingston, Joseph Read, Nathaniel Marston, Joseph Haynes,
John Livingston, Abraham Lodge, David Clarkson,
705 Leonard Lispenard and James DeLancey the younger, Gentlemen, to be the present Governors of the College; and we do by these presents ordain and appoint our well beloved Samuel Johnson, Doctor of Divinity, to be the first and present President of the said College, for and during his good behavior; and do will that he and the President for the time-being after him, who shall also hold his office during good behavior, shall have the immediate care of the education and government of the students that shall be sent to and admitted into the said College for instruction and education, according to such rules and orders as shall be made by the Governors of the said College; and they are by these presents made and
constituted a body corporate and politick, by the said
706 name of the Governors of the College of the Province of New York, in the City of New York, in America; and they and their successors, by the said name of the Governors of the College of the Province of New York, in the City of New York, in America, be and forever hereafter shall be a body politick and corporate in deed, fact and name, and shall be capable and able in law to sue and be sued, implead and be impleaded, answer and be answered unto, defend and be defended, in all courts and places before us, our heirs and successors, and before all and any of the Judges, Justices, Officers and Ministers of us, our heirs and successors, in any court or courts, place or places whatsoever, in all and all manner

of actions, suits, complaints, pleas, causes, matters, and demands whatsoever, and of what kind or nature soever, in as full, ample manner and form as any of our other liege subjects of our said Province of New York, can or may sue or be sued, implead and be impleaded, defend and be defended, by any lawfull ways and means whatsoever. And, also, they and their successors, by the said name of the Governors of the College of the Province of New York, in the City of New York, in America, be and forever hereafter shall be a body corporate, capable and able in law to purchase, take, hold, receive, enjoy and have any messuages, houses, lands, tenements, her-
707 editaments and real estate whatsoever, in fee simple, or for a term of life or lives, or years, or in any other manner howsoever, for the use of the said college; provided always, the clear yearly value thereof do not exceed the sum of Two Thousand Pounds Sterling; and also Goods, Chattels, Books, Moneys, Annuities and all other things of what nature and kind soever. And also that they and their successors by the same name of the Governours of the College of the Province of New York, in the City of New York, in America, to and for the use of the said college, shall and may have full power and authority to erect and build any house or houses, or other buildings, as they shall think necessary or convenient; and also, to give, grant, bargain, sell, demise, assign
708 or otherwise dispose of all or any messuages, lands, tenements, rents, and other hereditaments and real estate, and all goods, chattels, money and other things whatsoever, as to them shall seem fitt, either in the payment of the salary or salaries of the President, Fellows and Professors of the said College, or any other officers or ministers of the same at their will and pleasure; excepting always, and it is, nevertheless, our true intent and meaning that the said Governors of the said College for the time-being, and their successors, or any of them, shall not do or suffer to be done, at any time hereafter, any act or thing whereby or by means whereof the lands set apart and offered to be conveyed by the Rector and

inhabitants of the city of New York, in Communion of the Church of England, as by law established, for the use of the college or any part thereof, shall be vested, conveyed or transferred, to any other person contrary to the true meaning hereof, other than by such leases as are hereafter mentioned; our will and pleasure is, therefore, and we do for us, our heirs and successors, will and ordain, that no grant or lease of the said land or any part thereof, shall be made by the said Governors of the said College which shall exceed the number of twenty-one years, and that either in possession or not above three years before the end and expiration or determination
709 of the estate or estates in possession. And we do by these presents will, ordain and direct that the said Governors of the said College (except always the Lord Archbishop of Canterbury for the time-being, and our First Lord Commissioner for Trade and Plantations) do, at their first meeting, after the receipt of these our Letters Patent, and before they proceed to any business of and concerning the said college, take the oaths appointed to be taken by an act passed in the first year of our late Royal Father's Reign, entitled (An Act for the further security of His Majesty's Person, and Government, and the Succession of the Crown, in the Heirs of the late Princess Sophia, being Protestants, and for extinguishing the Hopes of the pretended Prince of Wales, and
710 his open and Secret abettors), and make and subscribe the declaration mentioned in An Act of Parliament made in the twenty-fifth year of the Reign of King Charles the Second, entitled, (An Act for preventing dangers which may happen from Popish Recusants); as also, an oath faithfully to execute the trust reposed in them as members of the said corporation, which oaths we authorize and empower the Justices of our Supreme Court of Judicature for our said Province of New York, for the time-being, any or either of them to administer; and that when and as often as any person or persons, either by his office or place in our said Government, or elsewhere, (except always the Lord Archbishop of Canterbury for the

time-being, and our first Lord Commissioner for Trade and Plantations for the time-being) or by choice of the said Governors of the said College, shall become or be chosen a member or members of the said corporation, they shall, before they are admitted, or enter into the said office or trust, take the said oaths and subscribe the said declaration, to be administered to them in the manner above directed. And we do further will, ordain and direct, that the Governors of the said College shall yearly and every year hereafter, forever on the second Tuesday in the month of May, in every year, meet together in our
said City of New York, for the better taking care of
711 and promoting the interests of the said college; and
that the said Governors of the said College, or any fifteen or more of them, being met, shall be a legal meeting of the said corporation, and they, or the major part of them, so met, shall have full power and authority to adjourn from day to day, as the business of the said college may require, and to do, execute and perform, all and every act and acts, thing and things whatsoever, which the said Governors of the said College are or shall by these, our Letters Patent, be authorized and empowered to do, act or transact, in as full and ample manner as if all and every of the members of the said corporation were present. And we do will, ordain and direct that as our
Right Trusty and well beloved Thomas, Lord Arch-
712 bishop of Canterbury and the Lord Archbishop of
Canterbury for the time being and our said first Lord Commissioner for Trade and Plantations, and the first Lord Commissioner for Trade and Plantations for the time-being, cannot attend the meetings of the said corporation, they and each of them shall, from time to time, have full power and authority to appoint a proxy, in writing, under their hand and seal, which person or persons so appointed by them, and each of them shall and may represent them, and each of them, respectively, according to such appointment, and shall have full power to vote and act as a Governor or Governors of the said corporation, at any and every meeting of the said corpo-

tion, as fully and amply as if they, the constituents, and each of them, were present at every such meeting or meetings; and, in case any other meeting or meetings of the said Governors of the said Collegs shall, at any other time or times be judged and deemed necessary for the carrying on and promoting of the business and interests of the said college, or the government thereof, by any five members of the said corporation, we do, by these presents, authorize and empower such five members by writing, and under their hands, to direct the clerk of the said corporation to give notice of the day appointed by them for such meeting, at the said City of New York,
713 by advertising the same in one or more of the publick newspapers at least seven days before such meeting; and, that at such meeting, the said clerk, before entering on any business, shall certify such notification under his hand to the board then met; provided, always, fifteen or more of the said members shall be then met together, which said fifteen or more members so met, in pursuance of such notification, shall be a legal meeting of the said Governors of the said College; and they, or the major part of them so mett, shall have full power and authority to adjourn from day to day, as the business of the said college may require, and to do, transact and perform all matters and things whatsoever that the said Governors of the said College are or shall be author-
714 ized and empowered to do by these presents. And, of our further Grace, certain knowledge and meer motion, to the intent that the said corporation and body politick may answer the end of their erection and constitution, and may have perpetual succession and continue forever, wee do for us, our heirs and successors, give and grant unto the said Governors of the said College of the Province of New York, in the City of New York, in America, and to their successors forever, that when and as often as they or any fifteen or more of the said members of the said corporation or of their successors shall be mett together at their said yearly meeting hereinbefore appointed, or at any other meeting upon notification, as

aforesaid, for the service of the said college, that the Governor or Commander in Chief of our said Province of New York, and, in his absence, the first person in rank in our said government, who holds his place as a Governor of the said corporation by his office, place or dignity, and in the absence of such, the eldest Governor or member of the said corporation then present, such seniority to be taken according as they are named in this our charter, during the lives of the present Governors, and after their death, the seniority to be taken and accounted as they have been a longer or shorter time Governors of the said corporation,

shall preside at such meeting from time to time, and
715 that at such meeting or meetings from time to time,

they or the major part of them so met, shall have full power and authority to elect, nominate and appoint any person to be president of the said college in a vacancy of the said presidentship for and during his good behaviours; provided, always, such president-elect or to be elected by them be a member of, and in Communion with the Church of England, as by law established; and, also, to elect one or more Fellow or Fellows, Professor or Professors, Tutor or Tutors, to assist the President of the said College in the education and government of the students belonging to the said college, which Fellow or Fellows, Professor or Professors, Tutor or Tutors, and every of them shall hold

and enjoy their said office or place, either at the will
716 and pleasure of the Governors of the said corporation

or during his or their good behaviour, according as shall be agreed upon between such fellow or fellows, professor or professors, tutor or tutors, and the said Governors of the said College, provided, always, such fellow or fellows, professor or professors, tutor or tutors, before they or either of them enter into or take upon themselves such office, do take the oaths and subscribe the declaration hereinbefore directed, to be taken and subscribed by the Governors of the said College before they enter upon their said respective offices; and that when and as often as any or either of the said offices shall become vacant by death or otherwise, the said Governors or the major part

of any fifteen or more of them so met as aforesaid, shall have full power to elect, nominate and appoint, other or others in their places, upon the same proviso or condition as aforesaid; and, also, to elect, nominate and appoint upon the death, removal, refusal to qualify or other vacancy of the place or places of any governor or governors of the said corporation not holding his office or place as a member of the same, by virtue of any other station, office, place of diguity, from time to time, other or others in their place and stead, as often as such vacancy shall happen, which governor or governors so from time to time

elected and appointed shall, by virtue of these Pres-
717 ents, and of such election and appointment, be vested

with all the powers, authorities and privileges, which any governor of the said corporation is hereby invested with. And, we do further, of our especial Grace, certain knowledge, and meer motion, for us, our heirs, and successors, grant and ordain that when and as often as the president of the said college or any fellow, professor or tutor, holding his place during good behaviour, shall misdemean himself in his or their said offices, and thereupon a complaint or charge in writing of such misdemeanor shall be exhibited against him or them by any member of the said corporation, at any meeting or meetings of the said corporation met and convened as aforesaid, that it

shall be lawful for the said members of the said cor-
718 poration then met, or the major part of them, from

time to time, upon examination and due proof, to suspend or discharge such President, Fellow, Professor or Tutor from the said office, or other or others in his or their place or places to appoint; and, we do further, for us, our heirs, and successors, will and grant that the said governors of the said college, or the major part of any fifteen or more of them, convened and mett as aforesaid. shall and may, from time to time, as occasion may require, elect, constitute and appoint a treasurer, clerk, and steward for the said college, and to appoint them and each of them their respective business and trust and to displace and discharge from the service of the said col-

lege, such treasurer, clerk or steward, and to elect other or others in their place or stead; and such treasurer, clerk and steward so elected and appointed, we do, for us, our heirs and successors by these presents constitute and establish in their several offices, and do give them full power and authority to exercise the same in the said college, according to the direction and during the pleasure of the said Governors of the said College, or the major part of any fifteen or more of them convened as aforesaid, as fully and freely as any other the like officers in any of our universities or any of our colleges in that part of our Kingdom of Great Britain called England, lawfully
719 may and ought to do; And we do further, of our special grace, certain knowledge and meer motion, give and grant unto the said Governors of the said College that they and their successors or the major part of any fifteen or more of them convened and mett together in manner aforesaid, shall and may direct and appoint what books shall be publickly read and taught at the said college, by the president, fellows, professors and tutors; and shall and may, under their common seal, make and set down, and they are hereby fully empowered, from time to time, to make and set down in writing such laws, ordinances and orders for the better government of the said college and students and ministers thereof, as they shall think best for the general good of the same, so that
720 they are not repugnant to the laws and statutes of that part of our Kingdom of Great Britain called England, or of our said Province of New York, and do not extent to exclude any person of any religious denomination whatever from equal liberty in advantage of education or from any the degrees, liberties, privileges, benefits or immunities of the said college, on account of his particular tenents in matters of religion; and such laws, ordinances and orders, which shall be so made as aforesaid, we do by these presents, for us, our heirs and successors, ratify, confirm and allow, as good and effectual to bind and oblige all and every the students and officers and ministers of the said college; and we do hereby au-

thorize and impower the said governors of the said college, or the major part of any fifteen or more of them, at any of their meetings convened as aforesaid, and the president, fellows and professors for the time-being, to put such laws, ordinances and orders in execution, that is to say, such as inflict upon any student the greater punishments of expulsion, suspension, degredation and public confession, by the Governors of the said College, or the major part of any fifteen or more of them, convened and met together as aforesaid only; and such as inflict the lesser punishments, by the President, Fellows and Professors, or any of them, according to the true in-
721 tent of such laws, ordinances and orders, as shall be made in pursuance of these presents for that purpose; and we do further will, ordain and direct that there shall be forever hereafter publick morning and evening service constantly performed in the said college, morning and evening forever, by the President, Fellows, Professors or Tutors of the said college, or one of them, according to the Liturgy of the Church of England as by law established, or such a collection of prayers out of the said Liturgy, with a Collect peculiar for the said college, as shall be approved of from time to time by the Governors of the said College, or the major part of any fifteen or more of them convened as aforesaid; and we do further will and grant that the said Governors of the said College for
722 the time-being or the major part of any fifteen or more of them convened as aforesaid, shall have full power and lawful authority to visit, order, punish, place and displace the Treasurer, Clerk, Steward, Students and other officers and ministers of the said college, and to order, reford and redress all and any the disorders, misdemeanors and abuses in the persons aforesaid, or any of them and to censure, suspend or deprive them, or any or either of them, so always, that no visitation, act or thing in or concerning the said college, be made or done by any other person or persons whatsoever but as is hereinbefore directed and declared. And we do further of our special grace, certain knowledge and meer motion, will, give and

grant unto the said Governors of the said College, that for the encouragement of the students of the said college to diligence and industry in their studies, that they and their successors, and the major part of any fifteen or more of them convened and mett together as aforesaid, do, by the President of the said College, or any other person or persons by them authorized and appointed, give and grant any such degree and degrees to any the students of the said college, or any other person or persons by them thought worthy thereof, as are usually granted by any or either of our universities or colleges in that part of our Kingdom of Great Britain called England, and that
723 the President, or such other person to be appointed for that purpose as aforesaid, do sign and seal diplomas or certificates of such degree or degrees, to be kept by the graduates as a testimonial thereof. And further, of our especial grace, certain knowledge and meer motion, we do for us, our heirs, and successors, will, give and grant unto the said Governors of the said College, and to their successors, that they shall and may have one common seal, under which they shall and may pass all grants, diplomas, and all other writings whatsoever, requisite, necessary or convenient to pass under the seal of the said corporation; which seal shall be engraven in such form and with such devices and inscriptions as shall be agreed upon by the said Governors of the said College, or
724 the major part of any fifteen or more of them that shall be convened for the service of the said college, in the manner above directed; and by these our Letters Patent it shall and may be lawful for them and their successors, at any of their meetings convened as aforesaid, as they shall cause, to break, change, alter and new-make the same, or any other common seal when and as often as to them it shall seem convenient. And we, further, for us, our heirs and successors, give and grant unto the said Governors of the said College, and their successors, or the major part of any fifteen or more of them convened as aforesaid, full power and authority, from time to time, and at all times hereafter, to nominate and appoint all

other inferior officers or ministers which they shall think convenient and necessary for the use of the college, not herein particularly named or mentioned, which officers and ministers we do hereby impower to execute their respective offices or trusts during the will and pleasure only of the Governors of the said College, or the major part of any fifteen or more of them convened as aforesaid, as fully and freely as any other the like officers or ministers in and of our universities or any other college in that part of our Kingdom of Great Britain called England may or ought to do. And lastly, of our express will and pleasure, and meer motion, we do, for us, our heirs, and successors, give and grant unto the said Governors of the said College, and to their successors forever, that these our Letters Patent, being entered of record, as is hereinafter particularly expressed, or the enrollment thereof, shall be good and effectual in the law, to all intents and purposes, against us, our heirs and successors, without any other license, grant, or confirmation, from us, our heirs or successors, hereafter by the said Government of the said College to be had or obtained, notwithstanding the not reciting or misrecital or not naming or misnaming, of the aforesaid offices, franchises, privileges, immunities, or other the premises or any of them; and notwithstanding a writ *Quod Damnum* hath not issued forth to inquire of or concerning the premises, or any of them, before the ensealing hereof, and statute, act or provision, or any other matter or thing to the contrary thereof in no wise notwithstanding; to have, hold, and enjoy, all and singular the privileges, liberties, advantages and immunities, and all and singular other the premises herein or hereby granted or meant, mentioned or intended to be herein and hereby given and granted unto them, the said Governors of the said College, of the Province of New York, in the City of New York, in America, and to the successors forever.

In testimony whereof, we have caused these our Letters to be made Patent, and the

Great Seal of our Province of New York to be hereunto affixed, and the same to be entered of record in our Secretary's office of our said Province in one of the books of Patents there remaining.

Witness our Trusty and well-beloved James DeLancey, Esqr., our Lieutenant Governor and Commander in Chief in and over our Province of New York, and the Territories depending thereon, in America, in, by and with the advice and consent of our Counsel of our said Province, this thirty-
727 first day of October, in the year of our Lord, one Thousand Seven Hundred and Fifty Four, and of our Reign the twenty-eighth.

The following erasures and interlineations appearing in these our Letters Patent. That is to say, in the first skin, line four, the word (Law.) Line nineteen, these words, (by these our Letters Patent, that there be erected and made). Interlined: line twenty-one, (with) wrote on Eraisure: line twenty-two, (Law) Interlined. In the second skin, line twelve, (the) interlined, and (Younger) wrote on Eraisure. In the third skin, the First line, (and secret, 0 and in the sixth line, (Administered) wrote
partly on Eraisure. In the twelfth line (And the first
728 Lord Commissioner for Trade and Plantations) interlined. And in the fourth skin, and first line, the word (And) Interlined.

———————————

———————————Clarke, Junior.

I hereby certify that the foregoing twenty-one pages is a true copy and the whole thereof, of the original charter of Columbia College, as printed for Columbia College by

E. B. Clayton of New York in the year 1836, which printed record is in the custody of the Regents in the New York State library.

JAMES RUSSELL PARSONS, JR.

Secretary.

January 7th. 1901.

729

Exhibit 69.

CHARTER OF UNIVERSITY OF ROCHESTER.

Mr. Blaikie: I next offer in evidence exemplified copy of the charter of the University of Rochester and ask that it be marked Complainants' Exhibit No. 6.

Mr. Bovee: Same objection.

730 The paper was marked Complainants' Exhibit No. 6, June 11th, 1901, C. B.

Complainant's Exhibit No. 6 is as follows:

(Appendix of Exhibits No. 69).

UNIVERSITY OF THE STATE OF NEW YORK.

To all whom it may concern, the Regents of the University of the State of New York, send

GREETING:

WHEREAS, William L. Marcy, Ira Harris, John N.

Wilder, Friend Humphrey and George R. Davis, citizens of this State, have by their petition presented to us pursuant to the statute in such case made and provided, prayed for the grant of a charter for the establishment of an Institution of the highest order for scientific and classical education, and have in their said petition, submitted to us the place where, the plan on which, and the funds with which it is intended to found and provide for the said institution, and have also proposed to us sundry persons hereinafter named as the first Trustees:—

And Whereas the said petitioners have also exhib-
731 ited to us, in their further application presented December 2nd, 1850, satisfactory proofs, that suitable buildings have been provided for the use of said institution, and also that funds to the amount of one hundred thousand dollars, with which it is intended to found and provide for such institution or college, have been payed or secured to be paid by valid subscriptions of responsible parties or otherwise; the same being in conformity to our amended Ordinance relative to the incorporation of Colleges, adopted January 9th, 1851:—

And Whereas we the said Regents, after due consideration of the same, have approved of the contents of said petition and application:—

732

Now Therefore, Know Ye, that we the said Regents, in consideration of the premises, and in pursuance of the statute in such case made and provided, do grant and declare, that an Institution for the instruction of youth in the learned languages, and in the liberal and useful arts and sciences shall be and hereby is founded and established at or near the City of Rochester in the County of Monroe; that the Trustees of said College shall always be twenty-four in number; and that William L. Marcy, Friend Humphrey, Ira Harris, John N. Wilder and Smith Sheldon, of the city of Albany; Frederick Whittlsey, William Pitkin, Everard Peck, Elon Huntington, Wil-

liam N. Sage, David R. Barton, Edward Pancost and Elijah F. Smith of Rochester; Robert Kelly and William R. Williams of New York; Robert R. Raymond of Syracuse; Henry Tower of Waterville, Oneida County; Seneca B. Burchard of Hamilton, Madison County; John Munro of Elbridge, Onondago County; Alonzo Wheelock of Vienna, Ontario County; James Edmonds of Ridgeway, Orleans County; R. S. Burrows, of Albion, Orleans County; Rawson Harmon, jun., of Wheatland, Monroe County, and V. R. Hotchkiss of Buffalo, shall be the present Trustees, and that they and their successors shall be a body corporate and politic by the name of the University of Rochester; and said corporation is by
733 these presents invested with all the privileges and powers conceded to any College in this State, pursuant to the provisions of the sixth section of the statute entitled "An Act relative to the University," passed April 5th, 1813.

Provided, however, that if at or before the term of five years from the date of these Presents, the Trustees of the said University shall not furnish to the Regents satisfactory evidence, that they have invested, for the said University, funds amounting to not less than one hundred thousand dollars, either in bond and mortgages or unincumbered lands within the State, worth at least double the amount so secured thereon; or in stocks of this
734 State and the United States, at their market value at the time of investment; or in the bonds or certificates of stock, legally issued by some incorporated City in this State, at the par value, or in any one or more of the securities above enumerated, then this charter shall be void and of no effect; but in case they the said Trustees shall furnish satisfactory evidence as above, then this charter shall become perpetual.

In Witness Whereof, we have caused these Presents to be sealed with our seal, signed by our Chancellor and attested by our Secretary this

fourteenth day of February, in the year of our Lord one thousand and eight hundred and fifty-one.

UNIVERSITY OF THE STATE OF NEW YORK.

By the Regents of the University of the State of New York.

Whereas the said Regents by an instrument or
735 charter under their common seal, bearing date the fourteenth day of February in the year of our Lord one thousand eight hundred and fifty-one, on application duly made to them for that purpose, did, in pursuance of the power in them vested by law, establish an institution for the instruction of youth in the learned languages and in the liberal and useful arts and sciences at the city of Rochester, in the county of Monroe, and did appoint William M. Marcy, Friend T. Humphrey, Ira Harris, and other persons therein named, the first trustees thereof, and did thereby ordain and declare that the said trustees and
736 their successors should be a body corporate and politic by the name of the "University of Rochester" with the privileges and powers therein mentioned:

Provided, however, and it was thereby declared, that if at or before the expiration of the term of five years from the date of the said charter, the trustees of the said University of Rochester should not furnish to the said Regents satisfactory evidence that they invested for the use of the said University funds amounting to not less than One Hundred Thousand Dollars in securities of the character therein mentioned, that then the said charter should be void and of no effect, but in case they, the said

trustees should furnish evidence that such investment had been made, that then the said charter should become perpetual, as on reference thereto will more fully appear.

And whereas subsequently and for satisfactory reasons shown by the said trustees, the said regents by an instrument under their common seal, bearing date the first day of February one thousand eight hundred and fifty-six extended for the term of five years, the time allowed as aforesaid for the investment of the said sum of One Hundred Thousand Dollars for the use of the said University of Rochester.

737 And whereas the said trustees by their application to the said regents bearing date the seventh day of January, One thousand eight hundred and sixty-one, have represented that the real and personal property of the said University of Rochester, including the sum of Fifty-four thousand seven hundred and seventy-four dollars and thirty-nine cents invested in bonds and mortgages, is of the value of at least One hundred and ninety thousand dollars over and above its liabilities, but that for the reasons mentioned in the said application, it has not been found practicable to invest the full sum of One Hundred Thousand Dollars in the securities required by the charter, but claiming that they have substantially al-

738 though not literally complied with its provisions, and asking that in view of the promises, and of the stability, usefulness and great promise of the said institution, that its charter may be perpetual.

And we, the said regents having considered the said application, and being of opinion that it is expedient under the circumstances that the same should be granted, do in pursuance of the authority in us by law vested, grant, ordain and declare that the said proviso in the said charter of the University of Rochester, hereinbefore mentioned and in part recited, shall be deemed and taken to have been and the same is hereby declared to have been

complied with and fulfilled to the satisfaction of us the said regents and that the said charter be and the same is hereby made and declared to be perpetual, subject to the right of us the said regents and of our successors at any time hereafter to alter, modify or repeal these presents.

In witness whereof We the said Regents have caused our common seal to be hereto affixed and our Chancellor and Secretary to subscribe their names this Tenth day of January in the year One thousand eight hundred and sixty-one.

[L. S.]

739

G. Y. LANSING,

Chancellor.

S. B. WOOLWORTH,

Secretary.

I hereby certify that the foregoing six pages are a true copy and the whole thereof of the record of the charter of the University of Rochester which record is in the custody of the regents of the University of the State of New York.

740

JAMES RUSSELL PARSONS, JR.

Secretary.

January 7, 1901.

Exhibit 70.

CHARTER OF HAMILTON COLLEGE.

Mr. Blaikie: I next offer in evidence exemplified copy of the charter of Hamilton College and ask that it be marked Complainants' Exhibit No. 7.

Mr. Bovee: Same objection.

The paper was marked Complainants' Exhibit No.
741 7, June 11th, 1901, C. B.

Complainants' Exhibit No. 7 is as follows:

(Appendix of Exhibits No. 70).

By the Regents of the University of the State of New York.

Whereas the trustees of Hamilton Oneida Academy, in conjunction with many of the citizens of the Western district of this state, have, by their petition, made known to us, that they, the said applicants, were minded to found a college, by engrafting the same on the said academy, at or near the site of said academy, in the town of Paris, in the county of Oneida, and have signified to us, that
742 the name thereof shall be "Hamilton College," and have proposed to use the twenty-four persons, hereafter named, for the first trustees of the said college;

And whereas it satisfactorily appears, that funds are procured and provided, towards the support of said college, to the amount of fifty thousand dollars, and we having approved thereof, and it appearing to us, that the funds intended, by the said applicants, for the use of the said college, are as duly and sufficiently secured and vested for that purpose as is requisite and that the found-

ing of the said college can not be farther completed before the said trustees are incorporated:

Therefore, in virtue of the power in us vested, by law, we have granted and declared, and by these presents do grant and declare, that a college, for the instruction and education of youth, in the learned languages and liberal arts and sciences, shall be and hereby is founded and established, in the said town, that the trustees of the said college shall always be twenty-four in number; and that Henry Huntington, George Brayton, Morris S. Miller,
Nathan Williams, James S. Kip, James Carnahan,
743 Bedediah Sanger, Joseph Jirkland, John H. Lothrop,
Thomas R. Gold, Jonas Platt, James Eells, Asahel S. Norton, Ephraim Hart, William Hotchkiss, Joel Bristol, Henry McNiel, Peter Smith, Dirick Lansing, Jasper Hopper, Odadiah German, Arunah Metcalf, Simeon Ford, and Walter Fish, shall be the present trustees; and that the said trustees and their successors shall be a body corporate and politic, by the name of the trustees of Hamilton College, and shall have perpetual succession and shall be capable to sue and be sued, and to purchase, take, hold, enjoy, and have lands, messuages, tenements, hereditaments, and real estate whatsoever, in fee simple, or term of life, or lives, or years, or in any other manner
howsoever; and also goods, chattels, books, monies,
744 annuities, and all other things of what nature and
kind soever, provided, always, the clear yearly value of such real estate do not exceed the sum of thirteen thousand, three hundred and thirty-three dollars and one third of a dollar lawful money of the United States, and also to appoint a president and professors and tutors to have the immediate care of the education and government of the students, who shall be sent to and admitted into the said college, for instruction and education, according to such ordinances, rules, and orders, as shall be made by the said trustees, and also to appoint a treasurer and clerk, and all other needful officers and ministers, and assign to them their respective business and duties; and,

also from time to time to make such ordinances, rules, and orders, for the management and disposition of the lands and other real estate, and of the chattels and monies, and other property, at any time, held, or possessed by them, the said trustees, for the use of the said college; and for the more orderly and conveniently performing and executing the trusts and authorities hereby granted and committed to them, as they, the said trustees, shall deem most fit and beneficial, and also such ordinances, rules, and orders, directing and appointing what books shall be publickly read and taught in the said college, and of the president, professors, tutors, and
745 students thereof, as they, the said trustees, think best for the general good of the same; provided that no ordinance. rule, or order, to be made, by the said trustees, nor shall the appointment of a president, or of any professor, or tutor, in the said college, nor of a treasurer or clerk, or any other officer or minister, have any force or validity, unless the same shall be agreed to by the major part of any thirteen or more of them, the said trustees, convened and met together, and provided farther that no such ordinance, rule, or order,shall be repugnant to the laws of this state, or the laws of the United States, neither shall any of them extend to exclude any person of any religious denomination whatever from equal liberty and advantage of education, or
746 from any of the degrees, liberties, privileges, benefits, or immunities of the said college, on account of his particular tenets, in religion; and provided, also, every such ordinance, rule, or order, whereby the punishment of expulsion, suspension, degradation, or publick confession, shall be inflicted on any student, shall be put in execution, only by such major part of any thirteen or more of the said trustees; that the president of the said college shall hold his office for and during his good behaviour; but that all professors and tutors, and every treasurer and clerk, and all other officers and ministers, shall hold their respective offices, at the will and pleasure of the said trustees, that there shall be two meetings of

the said trustees, in the said town, in every year, on such days, and at such place, as the said trustees shall by ordinances to be by them, from time to time, made in that behalf, appoint to be denominated stated meetings; and until the said trustees shall have made an ordinance, appointing the days and place of such stated meetings, the same shall be held, on the last Tuesday in May, and on the last Tuesday in September, and in the building hitherto called the academy;

That when any special meeting of the said trustees, shall be deemed necessary, the senior trustee, then
747 residing, in the said town, and taking upon himself the exercise of the office, shall, on application for that purpose, in writing, under the hands of any five, or more, of the said trustees, appoint a time for such special meeting, at some convenient place, in the said town, and cause due notice thereof to be given, by advertising the same in one or more of the publick newspapers, printed in Utica, at least twenty days before such meeting; and at such meeting such senior trustee, before entering on any business, shall certify such notification to the trustees then met; that whenever the said trustees shall be met together, at any meeting, the senior trustee, then present, shall preside, at such meeting; that the seniority intended in these two several cases, shall be deter-
748 mined, according to the order in which the said trustees are herein named, and shall be hereafter elected;

That the said trustees may, by the president of the said college or any other person, by them authorized, and appointed, give and grant any such degree and degrees, to all such persons thought by them worthy thereof, as are known to and usually granted by any University or college in Europe;

That the said trustees shall and may have a common seal, under which they shall and may pass all grants,

diplomas, and all other writings whatsoever requisite or convenient to pass, under such seal, and which shall be engraven, in such form, and with such devices and inscription as shall be agreed upon, by the said trustees, and to alter the same, at their pleasure, and finally, that the said trustees and their successors, forever shall enjoy all the corporate rights and privileges which we are empowered to grant.

In Testimony whereof we have caused our common seal to be affixed to these presents the twenty-sixth day of May in the thirty-sixth of the Independence of the United States 1812.

UNIVERSITY OF THE STATE OF NEW YORK.

749

By the Regents of the University of the State of New York.

An Ordinance to amend the charter of Hamilton College.

An application having been made to the said Regents by the Trustees of Hamilton College, for an amendment of the Charter of the said College, in order to provide
750 for the election of four additional Trustees by the Alumni thereof, and it appearing that due public notice of the said application has been given as required by the ordinance of the said Regents in that behalf, and no objection thereto having been presented.

Now therefore be it known, that the said Regents of the University, by virtue of the authority in them by law vested, do ordain, determine and declare, that the charter of Hamilton College be and the same is hereby amended as follows; subject, however, to the power of the said Regents, at any time hereafter, on cause satisfactory to to them, to alter, amend or repeal this Ordinance.

1. On the day preceding the next annual Commence- of Hamilton College, at twelve o'clock noon, an election shall be held in the Chapel of the College or at such place in the village of Clintonas the Trustees of the College may designate, to choose four additional Trustees of said College, which Trustees, when duly chosen, shall possess the same powers and perform the same duties as the other Trustees of the College. Such election shall be by ballot, and every graduate of the College of at least three years' standing, shall be entitled to vote at such election. No person shall be elected as one of the said additional Trustees unless he be a graduate of the College of at
751 least ten years' standing. Immediately after the election, the Trustees so chosen shall be so classified by lot, that the term of office of one of them shall expire with the close of Commencement day of the year after such election—the second in two years, the third in three years, the fourth in four years after such first named Commencement day.

2. On the day preceding each subsequent Commencement day, an election shall be held to choose one Trustee to fill the place of the person whose term of office is about to expire. The person so chosen shall hold his office for the term of four years, and all the provisions of the first section of this ordinance relating to the qualifications
752 of voters and the eligibility of candidates, and the time, place and manner of holding the election, shall be applicable to all such elections.

3. The Trustees of the College shall appoint Inspectors of all elections, and may prescribe such rules and regulations as they may deem proper for conducting the same, and for canvassing the votes and declaring the result. They shall also provide for the classification of the Trustee to be elected in pursuance of the first section of this Ordinance.

4. Thirteen Trustees, regularly convened, shall hereafter constitute a quorum of the board.

In Witness whereof, the said Regents have caused their Common Seal to be hereunto affixed, and their Chancellor and Secretary to subscribe their names, this fourteenth day of January in the year one thousand eight hundred and seventy-five.

JOHN V. L. PRUYN,

Chancellor of the University.

753

S. B. WOOLWORTH,

Secretary.

I hereby certify that the foregoing eight pages are a true copy of the whole thereof of the record of the charter of Hamilton College and an amendment to said charter which record is in the custody of the regents of the University of the State of New York.

JAMES RUSSELL PARSONS, JR.

754 Secretary.

January 7, 1901.

Exhibit 71.

Mr. Blaikie: I next offer in evidence pages 908 and 909 of the record of the trial before Mr. Justice Truax on the appeal from the General Term to the Court of Appeals and ask that they be marked Complainants' Exhibit No. 8 of this date.

Mr. Bovee: Same objection.

The pages were marked Complainants' Exhibit No. 8, June 11th, 1901.

755

Complainants' Exhibit No. 8 is as follows:

(Appendix of Exhibits No. 71).

NEW YORK, March 6, 1894.

Counsel for the New York Eye and Ear Infirmary presents copy of charter, and affidavits showing capacity of that institution to take.

Counsel for Dartmouth College, Amherst College, Wesleyan University, Westminster Hospital, University of Virginia, Princeton College of New Jersey, Lincoln University, Hampton Normal and Agricultural Institute, and the President and Trustees of Bowdoin College, pres-

756 ent certificates of incorporation and papers, showing capacity of those institutions to take.

Counsel for the Woman's Hospital in the City of New York and Brown University presents incorporation papers.

Counsel for Hamilton College presents copy of charter and affidavit.

Counsel for the University of Rochester presents copy of charter and affidavit.

Counsel for Yale College, Rutgers College, Marietta College, Cornell University, Elmira College and Lincoln University present papers.

Counsel for Barnard College presents charter and papers.

Counsel for Columbia College presents papers.

757 Counsel for Northwestern University presents papers.

Counsel for Adelbert College and Wesleyan University presents proof of incorporation and affidavit.

Counsel for Union College presents papers.

Counsel for the defendants, the executors of Lucy Fayerweather, and Mary W. Achter and Emma S. Fayerweather produces proof of service of answer in the months of August and September, 1893, upon all the different parties in the action.

Marked Exhibits J1 and J2.

758

Counsel for Wells College presents certificates showing their organization and competent to take.

Counsel for St. Vincent's Hospital, for Williams College, for Shattuck School and for University of Pennsylvania produce papers showing incorporation of the several institutions and their capacities to take.

Mr. Root: Before proceeding with the argument, under the leave which your Honor reserved, I wish to move to

strike out the testimony of Mr. Vaughan as to personal transactions and communications between himself and Mr. Fayerweather.

Objected to by Mr. Arnoux.

Motion denied. Exception.

Mr. James: We make the same motion.

Motion denied. Exception.

Objection overruled. Exception.

It is conceded that no payment has been made under the deed of gift to the institutions therein named, and that it was sufficiently proved that all the institutions,

plaintiff and defendant, named as legatees in the

758 Will and Codicils of the decedent and in the Deed of

Gift, as donees thereunder, were duly organized and incorporated and had capacity under their respective charters to take and hold the amounts of such gifts.

Exhibit 72.

759

CHARTER OF WESTERN RESERVE COLLEGE.

Mr. Blaikie: I now offer in evidence the title page of the Laws of Ohio, 1825–1826, and pages 93, 94 and 95, being the charter of the Western Reserve College, and when they are incorporated in the minutes will apply to the Court that they be read with like force and effect as the original.

Mr. Bovee: Same objection.

The pages offered are considered as Complainants' Exhibit 9, of this date.

Complainants' Exhibit 9 is as follows:

(Appendix of Exhibits No. 72).

ACTS

of a

GENERAL NATURE

Passed at the First Session

of the

761 Twenty-fourth General Assembly

of the

STATE OF OHIO,

Begun and held in the Town of Columbus,

December 6, 1825.

762 And the Twenty-fourth Year of Said State.

VOL. XXIV.

Published by Authority.

COLUMBUS.

Printed by Geo. Nashee, State Printer.

1826.

An act to incorporate the Trustees of the Western Reserve College.

Corporation created.

SEC. 1. Be it enacted by the General Assembly of the state of Ohio, That George Swift and Zalmon Fitch, of Trumbull county; Caleb Pitkins, John Seward, junior, Elisur Wright, Joshua B. Sherwood, Benjamin Fenn and David Hudson, of Partage county; Stephen J. Bradstreet and Simeon Woodroof, of Cuyahoga county, Henry Brown and Herman Kingsbury of Lo-
763 rain county, and their successors, be, and they are hereby created a body

Style thereof

politic and corporate, to be styled the board of trustees of the Western Reserve College, and by that name to remain in perpetual succession, with full powers to sue, and be sued; plead and be impleaded; to acquire, hold and convey property, real

To make by-laws, etc.

and personal; to have and use a common seal; to alter and renew the same at pleasure; to make and alter from time to time such by-laws as they may deem necessary

Proviso.

for the government of said institution, its officers and servants; Provided, such
764 by-laws are not inconsistent with the constitution and by-laws of the United States or of this state; also, to have power to confer on those whom they may deem worthy, all such honors and degrees as are usually conferred in similar institutions.

Location of the college.

SEC. 2. That the said College shall be located in the township of Hudson, in the county of Portage, and shall be erected on a plan sufficiently extensive to afford instruction in the liberal arts and sciences; and the trustees may, as their ability shall

increase and the interests of community require, erect additional departments for the study of any or all the liberal professions.

The board of trustees to appoint officers.

SEC. 3. That the board of trustees shall, from time to time, appoint a President, Vice-President and other officers and instructors, and also such servants of the institution as may be necessary, and shall have power to displace any or either of them for good and sufficient reasons, and also to fill all vacancies which may happen by resignation, death or otherwise; and also to prescribe and direct the course of study to be pursued in said institution and its departments.

Vacancies to be filled.

765

Rank of the President and his powers.

SEC. 4. The president of the college shall be *ex officio* a member of the board of trustees and president of the same, and in his absence the vice-president shall preside in the meeting of the board, and in the absence of both the president and vice-president, the board shall elect one of their own members to preside for the time being; Provided, That if any of the said trustees shall be permanently appointed president of said college, his office of trustee shall be deemed vacant; and the board of trustees shall fill the same accordingly.

766

Proviso.

Twelve trustees to manage the institution.

SEC. 5. That the board of trustees shall consist of twelve members, exclusive of the president; any seven of whom shall constitute a quorum to do business; said board of trustees shall hold their first annual meeting in the township of Hudson, on the first Wednesday of March, eighteen hun-

dred and twenty-six; and afterwards they shall meet on their own appointments, but in cases of emergency, the president with the advice of two trustees, may call a special meeting of the board, or any five members may call such meeting by giving notice to each member at least ten days before the time of said meeting.

Duty of trustees in applying funds.

SEC. 6. The board of trustees shall apply all funds by them collected or received, according to their best judgment, in
767 erecting suitable buildings, supporting the necessary officers, instructors and servants, and in procuring books, maps, charts, globes and other apparatus necessary to the success of the institution; Provided, nevertheless, that in case any donation or bequests, shall be made for particular purposes, and the corporation shall receive and accept the same, every such donation or bequest shall be applied in conformity to the condition or design expressed by the donor.

Proviso as to donations.

Treasurer to give bonds.

SEC. 7. The treasurer of the institu-
768 tion shall always, and all other agents when required, before entering on the duties of their appointments, give bonds for the security of the corporation, and of the public, in such penal sums, and with such sureties as the board of trustees shall approve, and that all process against the corporation shall be by summons, and the service of the same shall be by leaving an attested copy thereof, with the treasurer of the institution, at least thirty days before the return thereof.

SEC. 3. That the legislature shall have a right to alter or amend this act, when they deem it necessary; Provided, that no funds or property belonging to said college shall ever be by law appropriated to any other purpose.

Subject to amendment by the legislature.

WM. W. IRVIN,

Speaker of the House of Representatives,

ALLEN TRIMBLE,

769 Speaker of the Senate.

February 7, 1826.

Exhibit 73

CHARTER OF WABASH COLLEGE.

770

Mr. Blaikie: I next offer in evidence the title page of the laws of Indiana for the years 1833–1834 and also pages 57, 58 and 59, being the charter of Wabash College, and when they are incorporated in the minutes will apply to the Court that they be read with like force and effect as the original.

Mr. Bovee: Same objection.

The pages offered are considered as Complainants' Exhibit 10, of this date.

Complainants' Exhibit 10 is as follows:

(Appendix of Exhibits No. 73).

LAWS

of the

STATE OF INDIANA,

Passed and Published at the Eighteenth Session

771 of the

GENERAL ASSEMBLY,

Held at Indianapolis, on the First Monday in December, One Thousand Eight Hundred and Thirty-Three.

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772 BY AUTHORITY.

INDIANAPOLIS:

Printed by Douglass and Maguire.

1834.

CHAPTER XVIII.

An Act for incorporating the Wabash Manual Labor College and Teacher's Seminary.

(Approved January 15, 1834).

Corporation created, its powers.

SEC. 1. Be it enacted by the General Assembly of the State of Indiana, That John Gilleland, James Thompson, Jacob Angle, David Clark, William R. Win- 773 ton, Robert C. Gregory, E. O. Hovey, T. A. Howard, James A. Carnahan, Andrew Ingram, M. M. Post, Williamson Dunn, L. G. Bell, Samuel Merrill, J. S. Thompson, and S. G. Lowery and their successors in office be, and they are hereby constituted and declared to be, a body corporate and politic by the name and style of the "Wabash Manual Labor College and Teacher's Seminary," and by that name they shall have perpetual succession. This body corporate or board of trustees shall have power to appoint a faculty in said college consisting of a president, profes- 774 sors and tutors, as the necessities of the institution may demand; and the faculty so appointed, by and with the approbation of the board of trustees, shall have power to grant and confer such degrees in the liberal arts and sciences as are usually granted and conferred in other colleges in the United States; Provided, however, that no degree shall be conferred, or diplomas granted, except to students who have acquired the same proficiency in the liberal arts and sciences as is customary in other colleges in the United States. The

Proviso.

board of trustees shall also have power to contract, to be contracted with, to acquire, hold, enjoy, and transfer property, real or or personal, in their corporate capacity, to make, have and use a common seal, and the same to alter at pleasure; to sue and to be sued, to plead and be impleaded, in any court of law or equity; to receive and accept of any grant, gift, donation, bequest or conveyance, by any person, company or corporation of any property, real or personal; and to hold and enjoy and dis-
775 pose of the same as may be deemed best for the interests of said college; to make, ordain, establish, and execute such by-laws, rules and ordinances, not inconsistent with the constitution and laws of the United States, or of this state, as they shall deem necessary for the prosperity of said college; Provided it shall not be lawful for said corporation to hold or be the owner of real estate exclusive of improvements exceeding the value of ten thousand dollars; and if by donation, devise or otherwise it should become the legal or equitable owner of real estate of
776 greater value, the same shall be sold by said corporation so soon as the value of said donation or devise can be obtained. And that no particular religious sect, or particular persons shall have preference in their admission to the privileges of this institution.

Fundamental laws.

SEC. 2. The following shall be the fundemental laws of said institution, to wit: the board shall never consist of more than sixteen members, of whom six when regularly convened, shall constitute a quorum

for the transaction of business. The board shall, at their first meeting, after the act of incorporation, divide themselves into four equal classes, the first of which shall go out of office at the close of the first year, and the vacancies be filled by a new election; the second at the close of the second year in like manner; the third at the close of the third year; and the fourth at the close of the fourth year, and the vacancies be filled by new elections immediately, so that ever afterwards one-fourth of the board shall annually go out of office, and the vacancies be filled by an annual election. The annual election of trustees shall be conducted as follows, to wit.: three weeks prior to the holding of such annual election, due notice shall be given by the trustees, by advertisement in a newspaper, published in the county where said college is situated, if any be there published; if not, in some newspaper published in one of the adjacent counties nearest thereto, giving notice of the time and place of holding said election. The contributors to said college, who may attend said meeting, shall then proceed to ballot for four trustees; and any person having a right to vote, not attending, may vote by proxy. Each contributor shall be entitled to one vote for every ten dollars contributed and paid in towards said institution, until said sum exceeds fifty dollars; then one vote for every twenty-five dollars until the same exceeds one hundred dollars; and for all over one hundred dollars, one vote for every fifty dollars; and the four persons receiving a majority of the votes given, shall be considered duly elected.

Vacancies.

777

778

The board shall have power at any of their meetings to fill vacancies which may occur in their body by death, resignation, removal or a failure of the contributors at any time to assemble and elect trustees as above provided. These elections shall all be by ballot. The first meeting of the board of trustees shall be at Crawfordsville, on Tuesday, the twenty-fifth of March, eighteen hundred and thirty-four. And the annual election for trustees shall be at such time in the month of March, and
779 at such place as may be agreed upon by the board at each preceding annual election.

Students instructed in agriculture, etc.

SEC. 3. To promote the health of students and diminish the expense of their education, the board shall make such arrangements, that those students who desire it, may be exercised and instructed in some species of agriculture or mechanical labor.

Course of studies.

SEC. 4. The board of trustees shall make it one of the first, and at present the most prominent object in their efforts, to
780 promote literature; to provide the means for conducting an English scientific department in the institution, with special reference to the qualification of teachers of common schools;

And further, the board shall make provision for a department preparatory to the college classes, so long as such department may be found necessary.

Right reserved.

SEC. 5. The Legislature reserves to itself the right to revise or amend the provi-

sions of this act of incorporation at any time after ten years, so as not, however, to impair the fundamental principles of the incorporation.

SEC. 6. This act is declared to be a public act, and the same shall be construed favorably for every beneficial purpose therein intended. Public act.

This act to be in force from and after its publication in the Crawfordsville Rec-
781 ord, printed at Crawfordsville, Indiana, and to continue in force for the term of fifty years.

Exhibit 73½.

CHARTER OE MARIETTA COLLEGE.

782

Mr. Blaikie: I next offer in evidence the title page of the Laws of Ohio for the year 1832-1833 and also pages 18 and 19, being the charter of Marietta College, and when they are incorporated in the minutes will apply to the Court that they be read with like force and effect as the original.

Mr. Bovee: Same objection.

The pages offered are considered as Complainants' Exhibit No. 11, of this date.

Complainants' Exhibit No. 11 is as follows:

(Appendix of Exhibits No. 73½).

773

774

ACTS

of a

LOCAL NATURE

Passed at the First Session

of the

785 Thirty-first General Assembly

of the

STATE OF OHIO,

Begun and held in the Town of Columbus,

December 3, 1832.

786 And the Thirty-first Year of Said State.

VOL. XXXI.

Published by Authority.

COLUMBUS.

David Smith, State Printer.

1832.

An Act to incorporate the "Marietta Collegiate Institute, and Western Teacher's Seminary."

SEC. 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO, That Luther G. Bingham, John Cotton, Caleb Emerson, John Mills, John Crawford, Arius Nye, Douglass Putnam, Jonas Moore, Anselm T. Nye, and their successors, and they are hereby created a body politic and corporate, with perpetual succession, with
787 the usual powers and incidents of a corporation, to be known and distinguished by the name and style of "The Trustees of the Marietta Collegiate Institute and Western Teacher's Seminary."

SEC. 2. That the said trustees, by the corporate name aforesaid, shall be competent to sue and be sued, plead and be impleaded, in all courts of law or equity; may have a common seal, and alter the same at pleasure; and may fill all vacancies in their own body, occasioned by death. resignation or neglect, for more than
788 one year, to attend to the duties of the trust.

SEC. 3. That the said trustees, or a majority of them, when met shall constitute a board; shall have power to appoint a president, secretary and treasurer, and such other officers and agents as they may deem necessary, and to prescribe their duties; and to make, ordain and establish such by-laws, rules and regulations for conducting the affairs of said corporation, as they may deem proper; Provided that the same be

not repugnant to the constitution and laws of the United States, or of this state.

SEC. 4. That the said trustees in their corporate capacity, shall be capable of receiving and acquiring by purchase, devise, gift, bequest or otherwise, property, real, personal or mixed; to be used, improved, expended or conveyed for the purposes of the trust; which purposes are hereby declared to be the instruction of youth in the various branches of useful knowledge,
789 and, especially, the education of teachers for common schools; Provided, that the annual income of the real property of said corporation shall not exceed five thousand dollars.

SEC. 5. That the said trustees shall have power to appoint such officers, professors and teachers for the instruction and government of said institute, as they may deem proper; and to prescribe rules for their government.

SEC. 6. That the said boards shall
790 have power to appoint an executive committee of one or more persons, not exceeding three, for the more immediate concerns of the institute, and the members of such committee and also the presiding officer of the institute shall, *ex officio*, be members of the board.

SEC. 7. That the board of trustees shall have power to elect honorary members, who shall have seats in the board of trustees, and admitted to take part in the discussions therein, but not to vote.

SEC. 8. That any future legislature shall have power to alter, amend or repeal this act; Provided, that the property or funds of the corporation hereby created shall not be thereby diverted to any purpose other than that intended by the donors.

DAVID T. DISNEY,

Speaker of the House of Representatives.

SAMUEL R. MILLER,

791

Speaker of the Senate.

December 17th, 1832.

Exhibit 74.

792

CHARTER OF HAMPTON NORMAL AND AGRICULTURAL INSTITUTION.

Mr. Blaikie: I offer in evidence title page of the Laws of Virginia for the years 1869–1870 and pages 164, 165 and 166, being the charter of Hampton Normal and Agricultural Institution, and when they are incorporated in the minutes will apply to the Court that they be read with like force and effect as the original.

Mr, Bovee: Same objection.

The pages offered are considered as Complainants' Exhibit No. 12, of this date.

Complainants' Exhibit No. 12 is as follows:

(Appendix of Exhibits No. 74).

793

794

ACTS

of the

GENERAL ASSEMBLY

795 of the

STATE OF VIRGINIA,

Passed at the Session of 1869–'70.

796

RICHMOND:

James E. Goode, Printer.

1870.

Chapter 122.

An act to incorporate the Hampton Normal and Agricultural Institution.

Approved June 4, 1870.

Preamble.

Whereas, it is represented to the general assembly, that under and by virtue of an act of incorporation granted by the circuit court of the county of Elizabeth City, on the twenty-first of September,
797 eighteen hundred and sixty-eight, certain property located in the county of Elizabeth City, in this state, formerly known as "Little Scotland," containing, by estimation, one hundred and sixty acres, has been and is now used as an institution of learning, known as the Hampton Normal and Agricultural Institute, and upon this property large and valuable college buildings have been erected, and the same have been provided with necessary and suitable furniture, apparatus and equipments as a seminary of learning:

The trustees of the Hampton Normal and Agricultural Institute incorporated.

798 1. Now be it enacted by the general assembly of Virginia, That O. O. Howard, George Whipple, M. E. Strieby, James A. Garfield, John F. Lewis, E. P. Smith, Robert W. Hughes, James F. B. Marshall, Alexander Hyde, B. G. Northrop, Samuel Holmes, Edgar Ketcham, William E. Whiting, H. C. Percy and S. C. Armstrong, and such others as they may associate with them, and their successors, be and are hereby constituted a body politic and corporate, by the name of The Trustees of the Hampton Normal and Agricultural Insti-

Corporate powers.

tute, and shall have perpetual succession and a common seal, and by the name aforesaid, they and their successors shall be capable in law, and shall have full power and authority to acquire, hold, possess, purchase, receive and retain to them and their successors forever, any lands, tenements, rents, goods, chattels, or interest of any kind whatsoever, which may be given or bequeathed to them, or be by them purchased for the use of an institution of learning, to be called the Hampton Normal and Agricultural Institute; provided the same do not exceed eight hundred thousand dollars in value; they and their successors shall have power to transfer, convey and dispose of the same in any manner whatsoever they shall adjudge most useful to the interests and legal purposes of the said institution; and by their corporate name may sue and implead, and be sued and impleaded, may answer and be answered in all courts of law and equity.

Purposes of the institute.

2. That the purposes of the said Hampton Normal and Agricultural Institute shall be as follows:

For the instruction of youth in the various common school, academic and collegiate branches, the best methods of teaching the same, and the best mode of practical industry in its application to agriculture and the mechanic acts; and for the carrying out of these purposes the said trustees may establish any departments or schools in the said institution.

Officers; how chosen.

3. That the trustees, or a majority of

them, shall chose by ballot, a president, secretary, treasurer, and such officers, teachers or agents as they shall deem necessary, and remove the same at pleasure, two-thirds of a quorum concurring in said removal. They shall also take bond from the treasurer, payable to the trustees of the Hampton Normal and Agricultural Institute, in such penalty and with such security as they may deem reasonable, and conditioned for the faithful discharge of the duties of his office, said duties to be prescribed by the said trustees, or a majority of them. The said trustees may make contracts in behalf of said institution, and, in general, manage the affairs of the institution.

Treasurer's bond.

Trustees may make contracts, etc.

4. That when there shall be a vacancy in the board of trustees, occasioned by death, resignation, removal or refusal to act, the remaining trustees, or a majority of them, shall, on being notified by the secretary or president, supply the vacancy at the next annual meeting. It shall be lawful for any five of the trustees to call a meeting of the trustees whenever they shall deem it expedient.

Vacancy in board of trustees; how filled.

How meeting of trustees called.

5. That the board of trustees shall never be less than nine nor more than seventeen, a majority of whom shall constitute a quorum.

Number of trustees quorum.

6. That the trustees may adopt such rules, regulations and by-laws, not contrary to the laws of this state or of the United States, as they may deem necessary for the good government of the institution.

Rules, regulations, etc.

Report of Board of Trustees.

7. That it shall be the duty of said board of trustees, whenever requested by the governor of this state or superintendent of education, to made a report of the general condition of the institution to the board of education to be by them communicated to the general assembly.

Ratification of rights, powers, etc., acquired under charter granted by circuit court of Elizabeth City.

8. That all the rights, privileges and properties acquired by the said Hampton Normal and Agricultural Institute, under the charter of incorporation granted
803 by the circuit court of the county of Elizabeth City, on the twenty-first day of September, eighteen hundred and sixty-eight, be and the same are hereby ratified and confirmed.

Said charter except so far as ratified by above section, revoked.

9. That from and after the passage of this act, the charter of the said Hampton Normal and Agricultural Institute, heretofore granted by the circuit court of the county of Elizabeth City, save so far as ratified by the preceding section, is hereby revoked and annulled.

Property of institute exempt from taxation: how long.

10. That any property held by the
804 Hampton Normal and Agricultural Institute for its legitimate purposes, shall be exempt from public taxes so long as any property, held by other institutions of learning in Virginia, for their legitimate purposes, is exempt; and whenever a tax shall be laid upon the same, if laid at all, the tax shall not be higher on said institution, in proportion to the value of its property, than on other institutions of learning in this state.

When taxed, in what proportion.

11. This act shall be in force from the passage thereof. Commencement.

Exhibit 75.

805

CHARTER OF WESLEYAN UNIVERSITY.

Mr. Blaikie: I next offer in evidence title page of the Laws of Connecticut, 1822-1833, and also pages 346, 347, 348 and 349, being the charter of Wesleyan College, and when they are incorporated in the minutes will apply to the Court that they be read with like force and effect as the original.

Mr. Bovee: Same objection.

The pages offered are considered as Complainants' Exhibit No. 13, of this date.

806

Complainant's Exhibit No. 13 is as follows:

(Appendix of Exhibits No. 75.).

THE PUBLIC

STATUTE LAWS

of the

STATE OF CONNECTICUT.

Passed Subsequent to the Revision in 1821.

Published by Authority of the General Assembly, under the direction and Superintendance of the Secretary of the State.

HARTFORD.

Printed by Charles Babcock.

1824.

Chapter xlviii.

An act to incorporate the Wesleyan University.

Sec. 1. Be it Enacted by the Senate and House of Representatives in General Assembly Convened, That Laban Clark, Thomas Birch, Heman Bangs, Isaac Kellogg, Aaron Sanford, Jr., James L. Phelps, John L. Smith, Wilbur Fiske, Joseph A. Merrill, Abel Bliss, Abraham Avery, John W. Hardy, Isaiah Fisk, William R. Shafter, George W. Stanley, Elijah Hubbard, Henry L. Dekoven, Jonathan Barnes, Wm. L. Storrs, Samuel D. Hubbard and Isaac Webb, and their successors in office, forever be, and they are hereby incorporated, and made, created and constituted a corporation and body politic, by the name and style of "The Wesleyan University," for the sole and exclusive purpose of establishing, organizing, maintaining and conducting a university or collegiate institution in the City of Middletown, of as high an order as the said corporation shall deem fit and proper; and by that name shall be, and are hereby, made capable in law to purchase, have, hold, receive, possess and enjoy estate, personal and mixed, of every kind and nature whatsoever, to an amount not exceeding 200,000 dollars, exclusive of the collegiate buildings, libraries, and apparatus, and the same to sell, grant, convey, alien, demise, manage and dispose of at pleasure; to sue and be sued, plead and be impleaded, defend and be defended, in any and all courts; and also to make, have,

Names of corporators.

Corporate name Object.

General powers

and use, a common seal, and the same to alter, break and renew at pleasure; to ordain, establish and execute such by-laws, ordinances, rules and regulations, as shall to them seem necessary, expedient or convenient, for the wise ordering and conducting the affairs and government of said corporation, not being contrary to the laws of the United States, or of this State; and generally to do and execute all, and singular the acts, matters and things, and to transact all business which to them
811 shall or may appertain, tending to promote the usefulness and prosperity of said institution, subject and according to the rules, limitations, conditions and restrictions hereinafter provided.

Proviso as to religious tenets.

Provided, That no by-law or ordinances shall be established by said corporation, which shall make the religious tenets of any person, a condition of admission to any privilege in said university; and that no president, professor or other officer shall be made ineligible for, or by reason of any religious tenets, that he may profess, nor
812 be compelled by any by-laws or otherwise, to subscribe to any religious test whatever.

For whom the estate of the corporation to be managed.

Sec. 2. All the estate and property of the said corporation shall be managed for and on behalf of the New York annual conconference; the New England annual conference, and the New Hampshire and Vermont annual conference, of the Methodist Episcopal Church, in the United States of America, or for and on behalf of the above named conferences, and such other annual

conferences as the conferences aforesaid may associate with them, or with the consent and agreement of the three annual conferences first above mentioned, for and in behalf of the general conference of the said Methodist Episcopal Church, by the persons aforesaid, and such others as shall or may in pursuance of the provisions of this act, be added to their number, and their successors forever, who are hereby constituted a board of trustees for the purposes aforesaid.

813

SEC. 3. Nine members of said board of trustees shall constitute a quorum for the transaction of business, except for the disposal of real estate, or for the election of trustees, for either of which purposes there shall be at least a majority of the whole number of trustees; and such majority shall have power at any legal meeting, by a major vote of those present, to fill any vacancy or vacancies in the board, or increase the number thereof, provided the whole number of said board, shall not at any time exceed thirty-nine; and also by a vote of

814 two-thirds of those present, to remove any member of said board whom they shall judge to be deficient in competency and faithfulness, in the discharge of his official duty or in moral character.

Quorum of board of trustees.

Filling of vacancies in the board.

Limitation of board.

Removal of trustee.

SEC. 4. The three annual conferences first specified in the second section of this act; or they together with such other annual conferences as shall be associated with them in pursuance of the provisions of said second section; or of the said general conference of the Methodist Episcopal Church,

with the consent and agreement of the said three conferences first above mentioned, may elect, in such manner, at such times, for such periods and in such proportion as shall by them be mutually agreed upon, a board of visitors not exceeding in number the board of trustees, who shall with said board of trustees constitute a joint board, to which said joint board it shall appertain, and power and authority is hereby conferred and granted to elect, by a majority of the votes of those convened, the president and faculty of the said university or institution; to frame ordain and enact by-laws, ordinances, rules and regulations; to prescribe the course of study in said university or institution; to direct and act in all other matters that relate to the proper regulation, government, discipline and instruction of the students, and to manage all the affairs of the said corporation, and to execute all the powers and privileges given by this charter, and not vested in the said board of trustees: Provided, that a majority of the said joint board shall in all cases be necessary to constitute a board for the transaction of business.

Board of visitors.

Joint board.

Powers.

Proviso as to quorum.

SEC. 5. The president for the time-being, of the said university and institution, shall have power to confer degrees and grant diplomas, in such form and for such persons as may be approved by a majority of the faculty, and a majority of the joint board of trustees, and visitors; which diplomas shall entitle their possessors respectively, to all the immunities and privileges which, either by usage or by statute, are

Degrees and diplomas.

allowed to possessors of similar diplomas, from any other university, college or seminary of learning.

This declared to be a public act,

SEC. 6. This act is hereby declared to be a public act, and shall be construed liberally for every beneficial purpose hereby intended; and no omission to use any of the privileges hereby granted shall cause a forfeiture of the same; nor shall any gift, grant, conveyance or devise, to or for the benefit of the corporation, be defeated

No omission to cause a forfeiture.

No gift, etc., to be defeated by informality.

817 or prejudiced by any misnomer, misdescription or informality whatever, provided the intention of the parties can be shown or ascertained, beyond reasonable doubt.

Exemption from taxation.

SEC. 7. AND BE IT FURTHER ENACTED, That the funds which may at any time belong to the institution, now incorporated, shall enjoy the like exemption from taxation, and the institution itself and its officers and students shall enjoy the same privileges and exemptions as have already been granted to Yale College, its officers and

Privileges.

818 its funds. Provided, however, that the corporation shall never hold in this State, real estate free from taxation, affording an annual income of more than six thousand dollars; and provided also, that the private property of the officers of the institution shall not be exempt from taxation.

Limitation.

First meeting.

SEC. 8. The Reverend Laben Clark is hereby authorized to fix the time and place, and give the notice, for the first meeting of

said board of trustees, and of said joint board of trustees and visitors.

MARTIN WELLES,

Speaker of the House of Representatives.

ROBERT FAIRCHILD,

President of the Senate, *pro tem.*

May 26th, 1831. Approved.

819 JOHN S. PETERS.

Exhibit 76.

CHARTER OF CORNELL UNIVERSITY.

Mr. Blaikie: I next offer in evidence title page of the Laws of New York of 1865 and the certificate on the second page thereof; also Chapter 585, being the charter of
820 Cornell University, and when they are incorporated in the minutes will apply to the Court that they be read with like force and effect as the original.

Mr. Bovee: Same objection.

The pages offered are considered as Complainants' Exhibit No. 14, of this date.

Complainants' Exhibit No. 14 is as follows:

(Appendix of Exhibits No. 76).

LAWS

of the

STATE OF NEW YORK,

Passed at the Eighty-fifth Session

821

of the

LEGISLATURE,

Begun January Third, and ended April Twenty-ninth, 1865, in the City of Albany.

822

ALBANY.

Weare C. Little, Law Bookseller,

525 Broadway.

1865.

CERTIFICATE.

STATE OF NEW YORK,

Secretary's Office.

ALBANY, June 13, 1865.

Pursuant to the directions of the act entitled "An act relative to the publication of the Laws," passed April 12, 1843, I hereby certify that the following volume of the Laws of this State was printed under my direction.

CHAUNCEY M. DEPEW,

Secretary of State.

In this volume every act which received the assent of a majority of all the members of the Legislature, three-fifths of all the members elected to either House thereof being present, pursuant to Section 14 of Article 7 of the Constitution of this State, is designated under its title by the words, "Three-fifths being present." (See Laws of 1847, Vol. 1, Chap. 253).

And every act which received the assent of two-thirds of all the members elected to each branch of the Legislature, pursuant to Section 9 of Article 1 of the Constitution, is designated under its title by the words, "By a two-third vote." (See Laws of 1842, Chap. 306).

Chapter 585.

An Act to establish the Cornell University, and to appropriate to it the income of the sale of public lands granted to this State by Congress, on the second day of July, eighteen hundred and sixty-two, also to restrict the operation of chapter five hundred and eleven of the laws of eighteen hundred and sixty-three.

Passed April 27, 1865; three-fifths being present.

825

The People of the State of New York, Represented in Senate and Assembly, do enact as follows:

Corporators.

Sec. 1. Ezra Cornell, William Kelly, Horace Greeley, Josiah B. Williams, William Andrus, John McGraw, George W. Schuyler, Hiram Sibley, J. Meredith Reed, John M. Parkey, and such other persons as may be associated with them for that purpose, are hereby created a body politic and corporate, to be known as the Cornell 826 University, which university shall be located in the town of Ithaca, in the county of Tompkins, in this state. The corporation hereby created shall have all the rights and privileges necessary to the accomplishment of the object of its creation as declared in this act, and in the performance of its duties shall be subject to the provisions and may exercise the powers enumerated and set forth in the second article of the fifteenth chapter, title one of the Revised Statutes of the State of New York.

Name and location of corporation.

Rights and powers.

First board of trustees.

SEC. 2. The first board of trustees of said corporation shall consist of the persons named in the first section of this act, together with the governor and lieutenant-governor, the speaker of the house of assembly, the superintendent of public instruction, the president of the state agricultural society, the librarian of the Cornell library, and the eldest male lineal descendant of Ezra Cornell, who shall be *ex officio* members thereof. There shall be seventeen trustees, exclusive of the *ex*

Number of Trustees.

827 *officio* trustees; and to make up the said number of seventeen the ten persons who are named in the first section of this act and the said *ex officio* trustees, or a quorum of all of them, shall, at their first meeting, in pursuance of this act, elect seven other persons to act with themselves as members of said board of trustees. But at no time shall a majority of the board be of any one religious sect, or of no religious sect.

Seven of them; how to be chosen.

A majority not to be of one religious sect.

SEC. 3. The farm and grounds to be occupied by said corporation, whereupon

828 its buildings shall be erected in such manner and to such extent as the trustees may, from time to time, direct and provide for, shall consist of not less than two hundred acres.

Object of corporation.

SEC. 4. The leading object of the corporation hereby created shall be to teach such branches of learning as are related to agriculture and the mechanic arts, including military tactics, in order to promote the liberal and practical education of the industrial classes in the several pursuits and

professions in life. But such other branches of science and knowledge may be embraced in the plan of instruction and investigation pertaining to the university as the trustees may deem useful and proper. And persons of every religious denomination, or of no religious denomination, shall be equally eligible to all offices and appointments.

Amount of property corporation may hold.

SEC. 5. The corporation hereby created may hold real and personal property to an amount not exceeding three million of
829 dollars in the aggregate.

Certain income, etc., given by Act of Congress to State, to be appropriated to corporation on certain conditions

SEC. 6. The income, revenue and avails which shall be received from the investment of the proceeds of the sale of the lands, or of the script therefor or of any part thereof, granted to this state by the act of congress, entitled "An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July second, eighteen hundred and sixty-two, are hereby appropriated to, and shall from time to time as
830 the same shall be received, be paid over to the trustees of the corporation hereby created, for its use and behoof in the mode and for the purposes in the said act of congress defined; provided, however, that no part of such payment shall be made unless the said trustees shall prove to the satisfaction of the comptroller, within six months after the passage of this act, that the said corporation possesses a fund of five hundred thousand dollars at least, given by Ezra Cornell, of Ithaca aforesaid, which last named fund shall be given ab-

solutely and without any limitation, restriction or condition whatsoever, save such as is in accordance with the provisions of this act, nor shall the same be in any manner repaid or returned to the said Cornell, his representatives or assigns, except as in this act provided, and any vote or resolution or act or proceeding to return or repay the same, except as in accordance with this act, shall be void; and provided, further, that no such payment shall be made unless

831 within six months from the passage of this act said Ezra Cornell of Ithaca, shall pay over to the trustees of Genesee College, located at Lima, in this State, the sum of twenty-five thousand dollars, for the purpose of establishing in said Genesee College a professorship of agricultural chemistry. Provided further, that the trustees of the People's College at Havana may, in place of a strict compliance with the conditions of the act, chapter five hundred and eleven of the laws of eighteen hundred and sixty-three, in the details thereof, within three months from the pas-

Peoples' College at Havana.

832 sage of this act, deposit such a sum of money as in addition to the amount already expended by them upon or for the purposes of their corporation shall, in the opinion of the regents of the University of New York, be sufficient to enable the said trustees fully to comply with the conditions of the said chapter five hundred and eleven of the laws of eighteen hundred and sixty-three. Such deposit, if made, shall be made in such place and on such terms as shall be satisfactory to the said regents of the university. And the said deposit shall not be withdrawn or removed or in any way

affected or impaired, except to be applied under the directions of the said regents for the purposes of the said People's College, or upon the trustees thereof, relinquishing any claim to the benefit of the said act of eighteen hundred and sixty-three. But nothing contained in this provision shall release the said trustees of the People's College from the conditions and obligations imposed or contained in section three of said act. They shall, on the contrary, in addition to the making and
833 continuing such deposit as aforesaid, within the said three months, show to the satisfaction of the said regents that they have complied with the requirements of the said section three, and that the college grounds, farm, work shops, fixtures, machinery, apparatus, cabinets and library occupied or owned by them are not encumbered, aliened or otherwise disposed of. And nothing contained in this provision shall release the said trustees of the People's College from a full and perfect performance of the terms and conditions of the said act, chapter five hundred and
834 eleven of the laws of eighteen hundred and sixty-three, in all its details and within the time therein limited therefor. Nor shall the trustees of the said People's College receive from the comptroller any portion of the income and avails of the said lands until they have complied with and performed the terms and conditions of the said act, chapter five hundred and eleven of the laws of eighteen hundred and sixty-three, to the satisfaction of said regents; nor shall they receive any portion of the said avails and income or revenue, unless

they comply with the conditions of this act by making and continuing the said deposit. If the said trustees of the People's College shall not, within the term mentioned in the said act, chapter five hundred and eleven, have complied therewith to the satisfaction of the said regents or if, within the said term of three months they shall not have made the said deposit in accordance with and upon the terms fixed by this act, then the avails, income and revenue which shall

Effect of compliance by said college with chapter 511, laws of 1863.

be received from the investments of
835 the proceeds of the sales of the said
lands or of the scrip therefor, shall be disposed of to the corporation hereby created in the manner provided for in this section, and not before. If, on the other hand, the said trustees of the People's College shall, within the time provided for in this act, chapter five hundred and eleven of the laws of eighteen hundred and sixty-three, and as herein provided, to the satisfaction of the said regents, comply with the conditions and obligations thereof and hereof, so that they shall be entitled to re-

ceive and enjoy the benefits thereof
336 and hereof, then the said fund of five
hundred thousand dollars given by Ezra Cornell, shall, in his option or that of his personal representatives or assigns, revert to him or them. Moreover, the trustees of the People's College may at any time upon written notice to the said regents, withdraw and remove the aforesaid deposit; but such notice and withdrawal, or either of them, shall be deemed a relinquishment and forfeiture by them of the benefit to them of the said chapter five hundred and eleven, and of the benefit of this

act, and thereupon, upon the performance of the said Ezra Cornell, or of his heirs and of the corporation hereby created of the conditions and obligations of this act, the said income, avails and remedy shall be disposed of to the said Cornell University, as is hereinbefore provided.

Within what time trustees to fulfill provisions of act of congress.

SEC. 7. The trustees of said university if they shall become entitled to the benefits of this act, shall make provisions to the satisfaction of the regents, in respect
837 to buildings, fixtures and arrangements generally, within two years from the passage thereof, to fulfill the provisions of the aforesaid act of congress. They shall also make all reports, and perform such other acts as may be necessary to conform to the act of congress aforesaid. The said university shall be subject to the visitation of the regents of the university of New York.

Trustees to dispose of property in any way without consent of legislature.

SEC. 8. From and after the time the said corporation shall have become entitled to the benefits of this act as aforesaid, the
838 said university grounds, farm, workshops, fixtures, machinery, apparatus, cabinets and library, shall not be encumbered, aliened or otherwise disposed of by the said trustees, or by any other person, except on terms such as the legislature of the state of New York shall have approved, and any act of the said trustees or that of any other person which shall have that effect, shall be void.

To whom university to be open.

SEC. 9. The several departments of study in the said university shall be open to ap-

plicants for admission thereto at the lowest rates of expense consistent with its welfare and efficiency and without distinction as to rank, class, previous occupation or locality. But with a view to equalize its advantages to all parts of the state, the institution shall annually receive students, one from each assembly district of the state, to be selected as hereinafter provided, and shall give them instructions in any or in all the prescribed branches of study in any department of said institution free of any tuition fee, or of any incidental charges to be paid to said university, unless such incidental charges shall have been made to compensate for damages heedlessly or purposely done by the students to the property of said university. The said free instruction shall moreover be accorded to said students in consideration of their superior ability and as a reward for superior scholarship in the academies and public schools of this state. Said students shall be selected as the legislature may from time to time direct, and until otherwise ordered as follows: The school commissioner or commissioners of each county, and the board of education of each city, or those performing the duties of such a board, shall select annually the best scholar from each academy and each public school of their respective counties or cities as candidates for the university scholarship. The candidates thus selected in each county or city shall meet at such time and place in the year as the board of supervisors of the county shall appoint, to be examined by a board consisting of the school commissioner or commissioners of the county, or by the

Education of one student from assembly district to be free.

839

Who entitled to free education.

Selection by whom to be made.

840

Examination of candidates for free education.

said board of education of the cities, with such other persons as the supervisors shall appoint, who shall examine said candidates and determine which of them are the best scholars, and the board of supervisors shall then select therefrom to the number of one for each assembly district in said county or city, and furnish the candidates thus selected with a certificate of such selection, which certificate shall entitle said student to admission to said university, subject to the examination and approval of the
841 faculty of said university. In making these selections preference shall be given (when other qualifications are equal) to the sons of those who have died in the military or naval service of the United States; consideration shall be had also of the physical ability of the candidate. Whenever any student selected as above described shall have been from any cause removed from the university before the expiration of the time for which he was selected, then one of the competitors to his place in the university from his district may be elected to succeed him therein, as the school com-
842 missioner or commissioners of the county of his residence, or the board of education of the city of his residence, may direct.

To whom preference shall be given, other things being equal.

SEC. 10. All payments made under this act, out of the treasury of the state, shall be made by the treasurer on the warrant of the comptroller out of the special fund on deposit with the treasurer, arising from the receipt of the income and revenue and avails mentioned in the sixth section of this act.

Payments; how to be made.

SEC. 11. Chapter five hundred and eleven of the laws of eighteen hundred and sixty-three, entitled, "An act to appropriate the income and revenue which may be received from the investment of the proceeds of the sales of the lands granted to the state by the act of congress, entitled, 'An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts,' approved July second, eighteen hundred and sixty-two, passed
843 May fourteenth, eighteen hundred and sixty-three," shall be read and construed subject to the provisions of this act, and whenever the provisions of said act, chapter five hundred and eleven of the laws of eighteen hundren and sixty-three, and the other provisions of this act shall conflict, the provisions of this act shall be deemed the law, and shall prevail.

SEC. 12. The legislature may at any time alter, or repeal this act.

SEC. 13. This act shall take effect im-
844 mediately.

Exhibit 77.

CHARTER OF YALE COLLEGE.

FAYERWEATHER *vs.* RITCH.

REYNOLDS *vs.* RITCH.

COMPLAINANTS' PROOFS.

NEW YORK, November 7th, 1901.

Adjourned to November 13th, 1901, at 2 p. m.

845

NEW YORK, November 13th, 1901.

Adjourned to November 18th, 1901, at 2 p. m.

NEW YORK, November 13th, 1901.

846 Met pursuant to adjournment.

Present: The Examiner, Mr. Blaikie and Mr. Bovee.

Mr. Blaikie: I offer in evidence the charter of Yale College. I first offer the Colonial Records of Connecticut, the title page thereof and page 363 thereof commencing "Act for a collegiate school. Whereas," etc., and ending on page 365 with the words, "see cause to order and appoint." I will ask that when this has been spread upon the minutes it shall have the same force

and effect as if the original were in evidence. I also offer the Colonial Records of Connecticut, 1717 to 1725, the title page thereof, and the statement on page 416 beginning "An Act in explanation of and addition to the act for erecting a collegiate school in this Colony," and ending on page 417 with the words "during his continuance in the said rectorship." And I shall ask that when they be spread upon the minutes they shall be received with the same force and effect as if the original were in evidence.

Mr. Bovee: Defendants object upon the ground that it is incompetent, irrelevant and immaterial to the is-
847 sues presented upon the special plea, and incompetent.

The documents offered were not marked, but are considered as Complainants' Exhibit No 1 of this date.

Complainants' Exhibit No. 1 is as follows:

848

(Title page)

The

PUBLIC RECORDS

of the

COLONY OF CONNECTICUT.

From August, 1869, to May, 1796.

Transcribed and edited, in accordance with resolutions of the General Assembly,

(Seal)

BY CHARLES J. HOADLEY,

Librarian of the State Library.

HARTFORD:

Press of Case, Lockwood and Brainard.

1868.

ACT FOR A COLLEGIATE SCHOOL.

Whereas severll well disposed and publik spirited persons of thair sincere regard to and zeal for the upholdings and propogation of the Christian protestant religion, by a succession of learned and orthodox men, have expressed by petition their earnest desires that full liberty and privilegg be granted unto certain undertakers, for the founding and suitably endowing and ordering a Collegiate School within this his Majesties Colonis of Connecticutt, wherein youth may be in-
851 structed in the arts and sciences, who through the blessing of Almighty God, may be fitted for public imployments both in church and civill state. To the intent therefore that all due encouragement be given to such pious resolutions, and that so necessary and religious undertaking may be sett forward, supported and well managed:

Be it enacted by the Governour and Company of the said Colonis of Connecticutt in General Court assembled, and it is enacted and ordained by the authority of the same that there be, and hereby is full liberty, right and priviledge granted unto Mr. James Noyes of Stonington, Mr. Israel Chancis of Stratford, Mr. Thomas Buck-
852 ingham of Saybrook, Mr. Abraham Pierson of Kenelworth, Mr. Samll Mather of Windsor, Mr. Timothie Woodbridge of Hartford, Mr. James Pierpoint of Newhaven, Mr. Samuel Andrew of Milford, Mr. Joseph Webb of Fairfield, Mr. Noadiah Russell of Midletowne, being all reverent ministers of the gospel, and inhabitants within the said Colonie, proposed to stand as trustees, partners, or undertakers for the said school, to them and their successors, to erect, forme, direct, order, establish, improve, and at all times in all suitable wayes for the future to incourage the said school in such convenient place or places, and in such form, maner, and under such orders

and rules, as to them shall seem meet and most conducive to the aforesaid and thereof, so as such rules or orders be not repugnant to the lawes of the civill government; as also to employ the moneys or any other estate which shall be granted by this Court, or otherwise contributed to that use, according to their discretion for the benefitt of the said collegiate scholl from time to time and at all times henceforward.

And be it further enacted by the authority aforesaid: That the before named trustees, partners or undertakers, together with such others as they shall associate to
853 themselves (not exceeding the number of eleven or at any time being lesse than seven, provided also that the persons nominated or associated from (376) to fill up —the said number be ministers of the gospell inhabiting within this Colonis and above the age of fortie years or the major part of them the said James Noyes, Israel Chancis, Thomas Buckingham, Abraham Pierson, Samll Mather, Timothie Woodbridge, James Pierpoint, Samll Andrew, Joseph Webb, and Mr. Noadiah Russell, undertakers, and of such persons so chosen and associated as abovesaid, at any time hereafter, have and shall have henceforth the oversight, full and complete right, liberty, power and priviledge, to furnish, direct, manage, order, improve and incourage from time to time and in all
854 times hereafter the said collegiate school so erected and formed by them, in such wayes, orders and maner, and by such persons, rector, master and officers appointed by them, as shall according to their best discretion be most conducible to attain the aforementioned end thereof.

And moreover, it is ordered and enacted by the authority aforesaid: That the said James Noyes, Israel Chancis, Thomas Buckingham, Abraham Pierson, Samll Mather, Timothie Woodbridge, James Pierpoint, Samll Andrew, Joseph Webb and Noadiah Russell, undertakers, trustees, or partners, and the said persons taken from time to

time into partnership, or associated as aforesaid with themselves, shall have and receive (and it is hereby given and granted unto them) the full and just sume of one hundred and twenty pounds in countrey pay to be paid annually and at all times hereafter (untill this Court order otherwise) to them and to such person or persons onely as they shall appoint and impower to receive the same, to be faithfully disposed of by the said trustees, partners or undertakers, for the end aforesaid, according to their discretion; which said sums shall be raised and paid in such wayes and manners, and at such a vallue as the countrey rates of this Colonie are and have been usually raised
855 and paid.

It is also further enacted by the authority aforesaid: That the said undertakers, and partners, and their successors be and hereby are further impowered to have, accept, acquire, purchase or otherwise lawfully enter upon, any lands, tenements and hereditaments to the use of the said school, not exceeding the vallue of five hundred pounds pr annu, and any goods, chattels, sume or sumes of money whatsoever as have heretofore already been granted, bestowed, bequeathed, devised or settled by any person or persons whatsoever upon and to and for the use of the said school towards the founding, erecting or endowing the same, and to sue for, recover and receive all such gifts, legacies, bequests, annuities, rents, issues
856 and profits arising therefrom, and to imploy the same accordingly; and out of the estate, revenues, rents, profitts, and incomes accruing and belonging to said school to support and pay, as the said undertakers shall agree and see cause, the said rector or master, tutors, ushers or other officers, their respective annual salleries or allowances; as also for the incouragement of the students to grant degrees or licences as they or those deputed by them shall see cause to order and appoint.

(Title page)

THE

PUBLIC RECORDS

of the

857 COLONY OF CONNECTICUTT,

From May, 1717, to October, 1725,

With the Council Journal from May, 1717 to April, 1726.

Transcribed and edited, in accordance with a resolution of the General Assembly,

858 (Seal)

BY CHARLES J. HOADLEY,

Librarian of the State Library.

HARTFORD:

Press of Case, Lockwood & Brainard.

1872.

An Act in Explanation of and Addition to the Act for erecting a Collegiate School in this Colony.

Whereas, pursuant to the powers and privileges granted to certain trustees for erecting a Collegiate School in this Colony, entitled An Act for a Collegiate School, the said trustees have erected the said school in the town of New Haven, which school is now known by the name of Yale College;

And whereas it appears to this Assembly, that an
859 explanation and enlargement of the powers and privileges granted by said act is necessary for the carrying on the affairs of the said college, for want of which it has laboured under great difficulties, very much to the prevention of that order and good education which is to be desired there,

Be it therefore enacted by the Governour, Council and Representatives, in General Court assembled, and by the authority of the same, That the said act, which provides that the number of the said trustees be not under seven nor above eleven, is not to be understood or taken so as to be restrictive of the (397) power—of the said trus-
860 tees never to choose any person to be a trustee when there is, of such persons as have been chosen and acted as trustees, eleven persons living in the Colony or elsewhere; but that, in case any person so chosen be by Providence incapacitated from attending that service, or shall himself decline the same, thro the necessity of his own affairs or for any other such reason as he shall judge requisite, the trustees, in any of their meetings lawfully called, may be understood to have, and it is hereby enacted and declared that they shall be taken to have, full power, by the majority of such meeting, to proceed to the choice of another trustee in the room of any such person.

And it is hereby further declared and enacted to be the true intent and meaning of the act aforesaid, that the said trustees shall be impowered, and they are hereby declared to have power, to meet together for considering, advising about and resolving upon, all matters belonging to the trust of the said college committed unto them as aforesaid, and to agree and conclude, order and determine, concerning them, by the majority of the said meeting; and by the same majority to choose and appoint a clerk, who shall, in a fair book prepared for that end, register and carefully preserve the acts of all such meetings.

861 And whereas it has been doubted what number of the said trustees may be lookt upon as a sufficient or full meeting, inasmuch as there is not in the aforesaid act any express mention made of any meeting of the said trustees; It is therefore, to prevent all scruple of that kind for the future, hereby provided and declared, that due notice being given to the trustees, by consent of any three of them, of a meeting of the trustees desired at any time or place, any seven or more of the trustees present at such time and place shall be esteemed a full meeting.

And it is hereby declared and enacted, that in all such meetings so called, or otherwise as the said trustees
862 in any such full meetings shall agree, all affairs under the care of the said trustees shall be determined by the majority of such meeting.

And whereas it has been found inconvenient in the election of persons to be trustees, the trustees election by the aforesaid act should be limited and restrained so as that the person who shall be chosen must necessarily be forty yeary of age:

It is hereby declared and enacted, that for the future the said trustees in any election of a person into that trust shall not be esteemed or held obliged by said act to

choose such persons as shall be above forty years of age, but may choose such persons otherwise qualified according to said act, provided he is thirty years of age.

And it is further hereby allowed, enacted, granted and provided, that whosoever shall be chosen and made a rector of the said college shall, by virtue thereof, become a trustee of the same, and be so esteemed and taken during his continuance in the said rectorship.

863

TESTIMONY RELATING TO EXHIBIT 78.

John B. Reynolds, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. Blaikie:

1. Q Were you present during the trial before Mr. Justice Truax of the Five College action?

A I was.

2. Q Each day?

A Every day.

3. Q And did you see Mr. Parsons there, Mr. John E. Parsons?

864

Mr. Bovee: I object to it as incompetent, irrelevant and immaterial to the issues presented upon the special pleas.

A I saw him every day he was there, and I think he was there every day.

4. Q When the plaintiffs rested who opened the case for the defense in your hearing, if you know?

Mr. Bovee: This is objected to as irrelevant and immaterial to the issues presented upon the special pleas, and incompetent.

A John E. Parsons.

5. Q Was any record kept of that opening to your knowledge?

Mr. Bovee: Same objection.

A Yes, sir.

6. Q By whom?

865 A By the stenographer of the court, which was printed so as to deliver to the several parties the next morning.

7. Q Who delivered it to you, if you know?

Mr. Bovee: Objected to as irrelevant and immaterial.

A Mr. John R. MacArthur had charge of the printing, and I suppose he delivered it to us all. I received mine the morning following every day. I cannot say that he personally delivered it to me, but I think he did.

8. Q Did you hear Mr. Parsons make that opening address in behalf of some or all of the defendants?

866 Mr. Bovee: Objected to as irrelevant and immaterial to the issues presented upon the special plea and incompetent.

A I did.

9. Q (Handing paper) Look at that paper and state whether or not that is the printed statement that was given by Mr. MacArthur at the time to you, if you know?

Mr. Bovee: Same objection.

A It is.

10. Q Have you read it over to-day?

Mr. Bovee: Same objection.

A Yes, sir.

11. Q Does it or not state what Mr. Parsons said at that time?

Mr. Bovee: Same objection.

A It does.

Mr. Bovee: Cross examination reserved.

Mr. Blaikie: I offer in evidence the paper shown the
867 witness commencing with the words "Mr. Parsons: Shortly after Mr. Fayerweather's death," on page 231, and ending with the words, "this most bountiful gentleman," on page 241, and ask that it will be incorporated in the minutes.

Mr. Bovee: This is objected to as irrelevant and immaterial to the issues presented upon the special plea and incompetent as not the authorized record of the proceeding on the trial before Judge Truax.

The paper was marked Complainants' Exhibit No. 2, November 18th, 1901, C. B.

868

Complainants' Exhibit No. 2 is as follows:

(Appendix of Exhibits No. 78).

ADDRESS BEFORE JUSTICE TRUAX OF SUPREME COURT BY MR. PARSONS.

Shortly after Mr. Fayerweather's death these papers were offered for probate as his will. After some delay, objections, to which your attention has already been called, were filed on the part of Mrs. Fayerweather,
869 the widow, she being represented by Mr. Coudert, and on the part of the nieces, two of them being daughters of one brother and the third the daughter of another brother of Mr. Fayerweather, they being represented by Judge Rollins.

The issues raised by these objections led to a long and a very animated contest. There were made by Messrs. Coudert and Rollins certain objections. They are an enlargement of the formal objections that were signed by the parties and by their attorneys; they consisted in claims that were made before the Surrogate in the discussion of various questions, and in discussion at the close of the evidence. The general position that was taken
870 by them was first that this residuary clause in the original will was not a devise of a residuary estate. It was a devise of a residuary estate, plus $2,100,000 given to the institutions mentioned in the ninth article of the will. The foundation of that contention was their insistence that the legacies to those institutions were made subject to the exercise of a discretion which the will conferred upon these three gentlemen. They claimed that they could so exercise that discretion, as practically to neutralize these legacies to the amount of $2,100,000; that just in proportion as did they exercise the power which was thus conferred upon them, they augmented the residuary provision, and that residuary provision was in

their own favor. They then claimed that whether the residuary provision applied to the entire estate, or whether it applied to only so much as should remain after taking out the $2,100,000 to these institutions, it was manifest, and it would be established by the testimony which they introduced, that there was a scheme on the part of Mr. Fayerweather to evade the Statute of 1860, to defy the law of this State; they put these various claims together as leading to the result that probate must be refused.

It was suggested during the contest that many of
871 these questions, perhaps, did not apply to a contest which was strictly probate in its character, but there were most earnestly pressed and insisted upon by Messrs. Coudert and Rollins the objections to which I have referred, and they claimed that they were pertinent to be considered by the Surrogate in the probate contest.

The witnesses who were examined, and from whose testimony it was sought to make out these claims were among others Mr. Ritch, who was examined at very great length. Upon his examination came in evidence these memoranda and other documents which have already been received here. There was also examined another of these three gentlemen, Mr. Vaughan standing so far as con-
872 cerns the estate of Mr. Fayerweather in the same attitude as Mr. Ritch, interested as was claimed by Messrs. Coudert and Rollins in one-third, either a separate one-third or a one-third jointly with the other two, in the entire residuary estate of Mr. Fayerweather, with the addition of the $2,100,000 which by the exercise of their discretion they could appropriate.

There was then presented to these gentlemen and to those who were advising them the consideration to which Mr. Bishop adverted in his opening: Were they to go upon the stand interested so far as the case showed to the extent of this legal interest in this vast property, with a

corresponding interest on their part to sustain documents which would give to them this large sum, or were they when examined to be able to say: "We have divested ourselves from any interest whatever in this estate."

The mode which was adopted to accomplish the latter result has been sufficiently indicated here. It was the execution on the 24th day of February, 1891, of what has been called the deed of gift. Now, when these gentlemen sat down to consider who should be the donees under this instrument, each of them knew in a general way what they supposed to correspond with the character and
873 the general purposes of Mr. Fayerweather. They felt that they were competent at all events to reach a conclusion upon the subject of what would be against any assumed or supposed wish on the part of Mr. Fayerweather. They had certain indications as to what would probably correspond with his wishes. Having that guide, they selected the donees mentioned in the deed of gift; they executed that instrument; they brought that instrument to the Surrogate's Court, and it produced the effect that was expected; freed them from personal interest; gave to their testimony the weight to which it was entitled, and made manifest that the inevitable result of that proceeding would be the establishment of these testamentary papers.

874 But that is not all. Mr. Ritch has already informed you that as early as the 14th day of February, ten days before the execution of the deed of gift, there had been reached the purpose to pursue this course. That purpose, it will appear, if Your Honor shall now receive the evidence, was manifested in the letter that to-day was produced by Mr. Holden, of Messrs. Coudert Brothers, and which was offered in evidence. It was withheld on your intimation that the time had not yet come to receive it, but it was handed over for the inspection of counsel. In it Mr. Frederick R. Coudert, senior member of that firm, was informed that there was this purpose; that these gentlemen proposed to make as donees those

persons whose share in Mr. Fayerweather's bounty might come within what they believed to be his wishes, but that if Mrs. Fayerweather knew of wishes on the part of Mr. Fayerweather, outside of what was known to them, or if Mrs. Fayerweather had herself wishes which being in the line of the desires of Mr. Fayerweather might be considered by these gentlemen, an effort would be made to give effect to them.

That purpose was declared as early as the 14th day of February, 1891, and in the midst of this controversy. For reasons which can be conjectured, Mr. Coudert and
875 his associate, Mr. Rollins, declined to participate in this transaction at that time, and left these gentlemen to act according to their best judgment under the exercise of the authority which they believed that they possessed, and in accordance with what they could infer to correspond with the wishes of the gentleman from whom this large bounty came.

Your Honor, from the care and attention which you have given to this case, must have observed that the man of all men who may be assumed best to know what Mr. Fayerweather's purposes were, and who so far as concerns the purposes that were last in his mind, is perhaps the only person who could know—Mr. Vaughan—they
876 have for reasons of prudence, as we suppose, omitted to put upon the stand. What Mr. Vaughan can testify to, of course, is manifest, because he was examined before the Surrogate. Astute counsel have thought that it was wise in the interest of their case that Your Honor should be called upon to pass upon these questions without any statement from that one of these gentlemen who saw Mr. Fayerweather last, who was a party in a certain sense perhaps, to some of this late correspondence, and who before the Surrogate did give testimony, valuable testimony, bearing upon these questions.

Now, I ask Your Honor to consider that this is not a

case which presents evidence of a desire on the part of Mr. Ritch, for example, to appropriate any part of this estate to himself. He has said that while there was no legal obligation on his part to do what was done, he recognized that his honor was at stake; that it was his pleasure to dispose of this property in that way that it should not benefit him personally, except as he was interested in the institutions to whom this property should go. The same is true of Mr. Bulkley, and the same is true of Mr. Vaughan. They are not here with any pecuniary interest in this property, and yet they find themselves arraigned upon the charge that, having learned from
877 Mr. Fayerweather that he had certain testamentary wishes, with knowledge that that was so having come in possession of a property of between three and four millions of dollars, they have perverted it to purposes which constitute a breach of faith as between them and their dead friend.

These gentlemen are sensitive upon that subject. Your Honor can see by the testimony of Mr. Ritch that it is hard for him, when examined as a witness, to tolerate charges of this kind, which he and we claim to be so wide of the truth. But there are several reasons to be brought to the attention of the Court in testimony, which as we think and as with great respect we propose to submit
878 to the Court, make the claim on the part of these plaintiffs peculiarly ungracious. I accept the word that was used by Mr. Bishop in his opening address. We think that the claim of these plaintiffs is ungracious. We think that it is more than that. We think that it is a claim which they neither should, nor can come here to sustain. We think that what occurred in connection with the probate contest brought to them, or may bring to them, with the other institutions named in the ninth article, so large a sum as $2,100,000, and we intend to maintain, that having through the action of the executors, and by the result of the probate contest which they brought about, secured a sum of $2,100,000, it is too late for them

years after to come forward and say that in doing this thing in which these institutions were participants, Messrs. Bulkley, Ritch and Vaughan, were guilty of breach of faith.

Now, a little in detail as to what occurred in the line of what I have brought to your attention. As the law then stood it was only necessary that there should be cited the persons having a natural interest in Mr. Fayerweather's estate; his widow was cited; these three nieces were cited, but the legatees were not cited. Some of them, some of those who are plaintiffs, came into the
879 Surrogate's Court and filed notices of appearance resting upon that for the right to participate in the proceeding, and some went farther and filed in the Surrogate's Court petitions by which they asked that they might be made technically and formally parties to the proceedings, and those petitions being granted, and orders entered, some of these plaintiffs became in that most formal way parties to the proceeding. They are to be presumed to know—they did know—what was the testimony given by the witnesses in the probate proceeding. They are to be presumed to know, and they did know of the introduction of those various items of documentary evidence they are presumed to know and they did know, of the execution of the deed of gift and of the fact that succeeding that deed, and due to its instrumentality, the foundation was laid for arguments, which resulted in
880 the withdrawal of these objections, and the establishment of these testamentary papers.

The particular reason consists in the reservation in the deed of gift of the right on the part of the donors, these three gentlemen, to make increased provision for Mrs. Fayerweather, to make increased provision for the other next of kin, the three nieces, and generally to do what they saw fit in the disposition of the residuary estate, subject, however, to the purpose which the deed of gift did accomplish, that it divested these three gentlemen absolutely of any personal or pecuniary interest in the estate. Their intention was that at that time there should

be created a situation which made it impossible for them in the future to receive any part of this estate for their own purposes, except those commissions to which they were entitled as executors.

I have said that this was preliminary to the result which came, the withdrawal of the objections and the eventual settlement, the details of which will be brought before you. In order that that should be brought about there was necessary, of course, the participation of the contestants. They are here now represented by Colonel James. There was necessary, also, the acquiescence
881 and participation of these various institutions, and therefore there was prepared, with such skill as was possessed by those who were advising these gentlemen, papers in the form with which you have some familiarity, the attorneys first expressing their approval of the general arrangement by an instrument which has not yet been brought to your attention, but which I understand exists and will come in evidence; that was followed by a general agreement; and that, by releases on the part of Mrs. Fayerweather and these three next of kin who, if the contention before the Surrogate were correct, and who, if the contention here is correct, as to one-half of the estate were the persons who could transfer that interest to these three gentlemen, for themselves, and for
882 those donees whom they had created such by their deed of gift.

Now, these instruments followed this general direction; but it is said on behalf of Colonel James, that in so far as these instruments received the signatures of Mrs. Fayerweather, Mrs. Achter and Mrs. Drury, who became Mrs. Emma S. Fayerweather, some fraud was perpetrated upon them, and you are asked as part of the general judgment which is to be made by you, to undo these instruments, to put these parties where they were before they received the large sums which came to them under these instruments, and if a secret trust should be estab-

lished here, to decree that that trust is in favor of them as next of kin of Mr. Fayerweather.

Now, the allegations and the answers of these parties are that there was a fiduciary relation between them and the three gentlemen, Messrs. Bulkley, Vaughan and Ritch, of which through some act of omission or of commission, advantage was taken to their harm. If my recollection serves me correctly it is suggested that these three ladies ought to have been informed of their legal rights by Messrs. Bulkley, Ritch and Vaughan, and that
they either were not informed, or that they were in-
883 accurately informed, and that therefore they exe-
cuted these instruments under a misapprehension, or a condition of ignorance for which Messrs. Bulkley, Ritch and Vaughan are responsible. Veiled language is used by them in the answers which have been prepared here, and was used in the complaint, in a direct suit which preceded this suit, in which the same charge was brought forward, any reference being carefully avoided to the fact that neither Mr. Bulkley, Mr. Vaughan nor Mr. Ritch ever had any communication with these parties in respect of these transactions, that those who acted for them were counsel learned in the law, but who as we claim correctly apprehended the law, but who, if they
did not, were none the less lawyers of their own
884 choosing, and for whose advice certainly we are not
responsible. These lawyers were Messrs. Coudert and Rollins, their counsel. I do not propose at this stage of the case, or at any stage, to entertain for one moment the idea that Your Honor can be prevailed upon to make a decree which will charge those gentlemen with violation of professional duty, whether the charge is ignorance or intention. Whatever may happen, I shall assume at the end of this trial, that these ladies were advised by most competent counsel, that they were correctly advised, and that through the advice of those counsel they received large sums of money, which otherwise would not have come to them, and that they are precluded from making

any objection to these instruments, the effect of which was to transfer any legal rights which they may have had to the donees of Messrs. Bulkley, Vaughan and Ritch, under their deed of gift.

Now, at that time this was the situation: A possibility perhaps it may be said a probability—that all of this estate would go to Mrs. Fayerweather and the three next of kin. Messrs. Coudert and Rollins were there for that purpose. These institutions, that being so, might lose the $2,100,000 which the ninth article gave to them. You will, therefore, easily see what a vast interest they
885 had to secure this $2,100,000 and to come into any transaction, the result of which might be to give to them this sum of money. They therefore did, with the exception of the University of Rochester, through the action of their constituted authorities, all unite in this general arrangement, and in that way they secured from these executors first the probate of these instruments, and next the exercise in their favor of a discretion, the result of which was up to this time to give to them, according to my recollection, 80 per cent. of the amount provided for by the will, and to secure to them such rights as they have to the additional 20 per cent. I think that if either of these institutions had at that time suggested that this deed of gift had violated a duty which these donors
886 owed to Mr. Fayerweather, there would have been a very different outcome of this transaction. I do not propose for one moment to intimate that at that time there was a purpose on the part of these institutions to mislead the executors to go on and obtain for them these sums of money, and then to turn around and charge with bad faith these from whom they had thus benefited. So far as concerns all of these institutions, with the exception of the University of Rochester, what transpired consists in formal instruments. So far as concerns the University of Rochester, I must have a word or two in this opening, at the expense of my friend, Mr. Cooke. We do not have the signature of his client to one of these

papers, but we have his signature to a promise that we shall have one of these papers. We have a letter from the president of the University of Rochester instructing us in respect of this business to communicate with Mr. Cooke as the attorney of the University, and as authorized by the Board to transact the business. We have as the excuse for the failure of execution by the University of Rochester of this paper, the statement that it had been difficult or impossible to obtain a quorum, and we have the promise that as soon as the Board of Trustees should meet, there being a quorum, this paper would then be executed.

887

Now, it was sometime after there had been sent to the University of Rochester the check for which Mr. Cooke's letter were clamoring, that we learned for the first time that we were to fail to obtain this instrument.

Now I do not suppose that we are to fare the worse by this omission. If it were possible, Mr. Cooke would fare the worse, for the reason that in these letters, some of which have come in evidence, and the others of which will, Mr. Cooke shows what intention was inside his mental organism. It is not a question of what Mr. Ritch testifies; it is a question of what Mr. Cooke thought; and we see exactly what Mr. Cooke thought, because he

888 told us so. This arrangement was to be a settlement of all claims which the University of Rochester had againt these executors, and all concerned, and particularly against the donees in the deed of gift. When repentance came, when Mr. Cooke changed his mind, when it occurred to these gentlemen that possibly these old claims could be revived, we do not know; but we do know that it was after they had received this sum of money which it was for us to say that they should receive or should not receive. We think that in view of what has been stated, and what will be proved, Your Honor will have no difficulty in reaching the conclusion that whatever may be said about the primary case for the plaintiffs,

things have happened, the outcome of which should be and must be that the situation shall remain as it is; that there shall not be the necessity for a decision of a question, the parties on one side of which are certainly most estimable institutions, and on the other side other most estimable institutions, and they engaged in an internecine strife to see whether one or the other set may not obtain less or more from the bounty of this most bountiful gentleman."

Exhibit 79.

889

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and ANOTHER;
Complainants,
against
THOMAS G. RITCH, &c., AND OTHERS,
890 Defendants.

JOHN B. REYNOLDS, as Sole Executor of the Estate of LUCY FAYERWEATHER, deceased, Compiainant,
against
THOMAS G. RITCH, &c., AND OTHERS,
Defendants.

In Equity, No. 6675.

It is hereby stipulated that at the times referred to in

the above entitled suit Lafayette College was, and now is a literary and scientific corporation.

Dated New York, February 28, 1902.

WM. BLAIKIE,
Solicitor for Complainants.

SWAYNE, SWAYNE, MORRIS & FAY,
Solicitors for Defendant Lafayette College.

891

Exhibit 80.

CHAPTER 99.

AN ACT TO INCORPORATE THE UNION THEOLOGICAL SEMINARY, IN THE CITY OF NEW YORK.

Passed March 27, 1839.

892

The People of the State of New York, represented in Senate and Assembly do enact as follows:

1. Thomas McAuley, Henry White, Samuel H. Cox, Thomas H. Skinner, William Patton, Erskine Mason, Ichabod S. Spencer, Absolom Peters, William Adams, Nathaniel E. Johnson, Henry A. Rowland, David Magie, Ansel D. Eddy, Selah B. Treat, Zechariah Lewis, Micah Baldwin, Charles Butler, Leonard Corning, Abijah Fisher, William M. Halsted, Caleb O. Halsted, Fisher How, Richard T. Haines, Joseph Otis, Anson G. Phelps, Pelatiah Perit, Cornelius Baker and Knowles Taylor, and their associates, who are the present directors and

their successors, are hereby constitued a body corporate, by the name of "The Union Theological Seminary, in the City of New York," and by that name shall have succession, and be capable in law of taking and holding by gift, grant and devise, or otherwise, and of purchasing and holding and conveying, both in law and equity, any estate, real or personal, provided that the clear annual value or income of their real estate shall not exceed the sum of fifteen thousand dollars, and their personal estate shall not exceed the sum of fifty thousand dollars, exclusive of such professorships as may be
893 be from time to time endowed.

2. The government of the seminary shall at all times be vested in a board of directors, which shall consist of twenty-eight members, one-half of whom shall be clergymen, and the other half laymen.

3. The board of directors already chosen shall be divided into four classes, to be numbered, one, two, three, and four; the term of the first class shall expire in one, the second in two, the third in three, and the fourth in four years, from the eighteenth of January last. The following persons shall be directors of the first class: Thomas H. Skinner, William Adams, Samuel H. Cox, Selah B. Treat, Abijah Fisher, Joseph Otis, Caleb
894 O. Halsted, and Leonard Corning: Of the second class, William Patton, Ichabod S. Spencer, Henry White, David Magie, Pelatiah Perit, Charles Butler and Micah Baldwin: Of the third class, Henry A. Rowland, Absolom Peters Nathaniel E. Johnson, Fisher How, Richard T. Haines, William M. Halsted, and Anson G. Phelps: Of the fourth class, Thomas McAuley, Ansel D. Eddy, Erskine Mason, Zechariah Lewis, Knowles Taylor and Cornelius Baker. Each class of directors shall hereafter be chosen for and hold their offices during four years, and until a new election to supply the places of such class.

4. The members of any class of directors may be eligible to a re-election; and each election shall take place at

least one week previous to the expiration of the term term of office of the class to be supplied; and the said directors shall have power to fill all vacancies in their own board which may happen from year to year; and the appointment to fill such vacancy shall be valid for the unexpired term of the director, whose office shall be vacant.

5. Equal privileges of admission and instruction with all the advantages of the institution shall be allowed to students of every denomination of Christians.

895 6. The legislature may at any time alter or repeal this act."

I hereby certify that the foregoing is a true copy and the whole thereof of Chapter 99 of the Laws of 1839.

27th February, 1902.

(Signed)

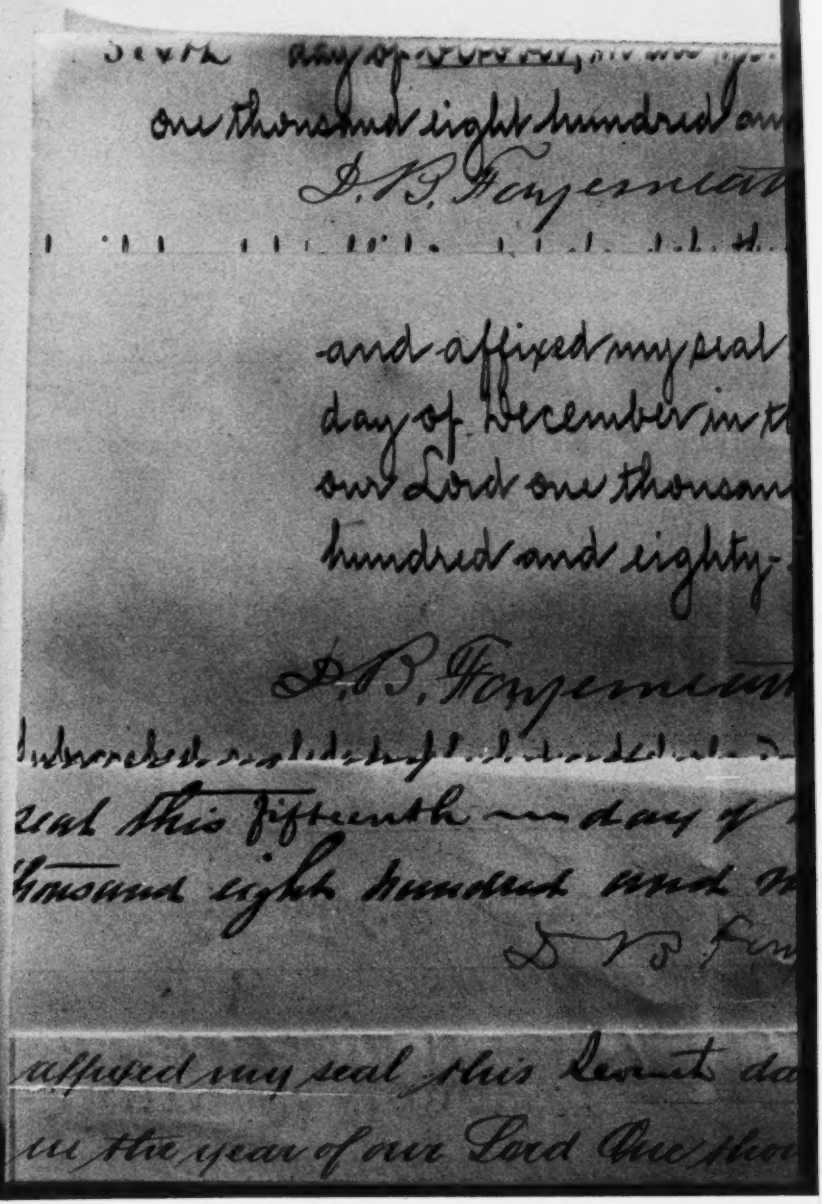
J. R. PARSONS, JR.

[SEAL.] *Secretary.*

896

EXHIBIT No. 81.

Photograph of the signature to the will of D. B. Fayerweather of Oct 6th, 1884, and of all the codicils except the Nov. 11th, 1890.



happen from y...

l such vacancy shall be valid for
the director, whose office shall be

of admission and instruction with
the institution shall be allowed to
omination of Christians.

re may at any time alter or repeal

at the foregoing is a true copy and
Chapter 99 of the Laws of 1839.
2.

(Signed)
J. R. PARSONS, JR.
Secretary.

Seventh day of ...

one thousand eight hundred and eighty-four.

D. B. Fayerweather

...

-and affixed my seal this 13th
day of December in the year of
our Lord one thousand eight
hundred and eighty-four. —

D. B. Fayerweather

...

seal this Fifteenth — day of November
thousand eight hundred and ninety.

D B Fayerweather

affixed my seal this Seventh day of January
in the year of our Lord One thousand eight
hundred and eighty eight

Sealed

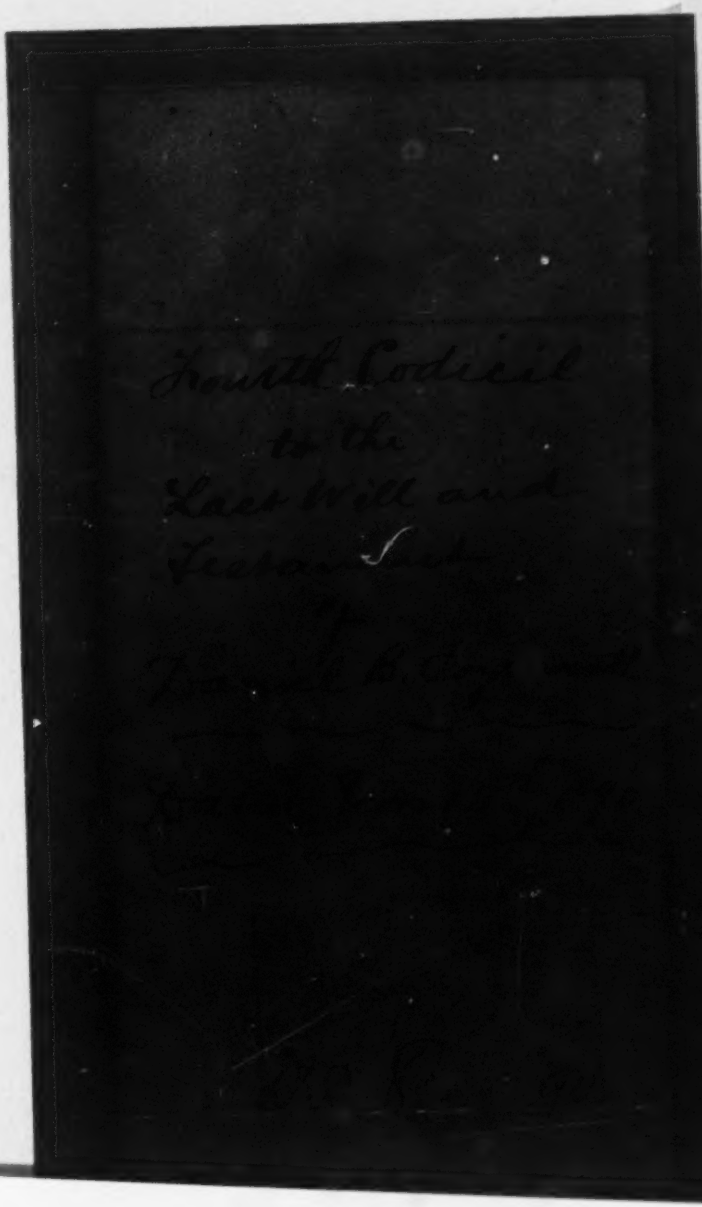
D. B. Fayerweather

and delivered in the

my name and affixed my seal this 19 day of March

EXHIBIT No. 82.

Photograph of Endorsement on codicil of Nov. 15th, 1890.



EXHIBT No. 53.

Enlarged photograph of signature of D. B. Fayerweather to the codicil of Nov. 15th, 1890.

FOLD OUT IS TOO LARGE TO BE FILMED

EXHIBIT No. 84.

Photograph of part of codicil of November 15th, 1890, with signatures of all parties present.

E

EXTRACTS FROM ELIZ

GATE'S

F. 905 Pa

(*Referring to the Codic*
day of Mr. Fayerweather

xxx A. "He looked very
he could hardly speak, an
well for writing."

Pag

Q. Did you have a
ncle? A. None at all.
Q. Was he in a fit con

906 Pag

x A. Witness: No; I t

By Mr. Condert:

Q. Did he as a matte
on that occasion?

A. At that time, do yo
Q. At that time, yes.
A. No.
Q. Except—well I will
e word while you were
on with signing this pap
. No; I think not. H
asked him.

Exhibit 85.

EXTRACTS FROM ELIZABETH R. JOYCE'S SURROGATE'S TESTIMONY.

F. 905 Page 273

(*Referring to the Codicil of November 15th, 1890, the day of Mr. Fayerweather's death.*)

xxx A. "He looked very ill and was very weak, and he could hardly speak, and could not use his hand very well for writing."

Page 274

Q. Did you have any conversation with your uncle? A. None at all.

Q. Was he in a fit condition to converse with you?

F. 906 Page 275

xxx A. Witness: No; I think not.

By Mr. Coudert:

Q. Did he as a matter of fact converse with anyone on that occasion?

A. At that time, do you mean?

Q. At that time, yes.

A. No.

Q. Except—well I will change that—did he say one single word while you were in the room there in connection with signing this paper?

A. No; I think not. He only answered the questions asked him.

Q. Now, how did he answer these questions?

A. Very weakly.

Q. How?

A. In a very weak manner.

Q. What was he asked, if you remember?

A. Just the formal questions, I think.

Q. Well, he was asked, if that was his last will?

A. Yes.

F. 907 Q. Was it that or codicils?

A. Last codicil.

Q. Now do you remember whether he answered it by word of mouth or with a nod.

A. I think he simply nodded.

Q. And with regard to the other questions, do you remember whether he answered them with a nod or by word of mouth?

A. I think not; I think just by nodding.

Q. And when he nodded you took that to mean yes.

A. Yes, sir.

F. 908

Q. Except such answers as he gave—those affirmative answers—did he express himself either by word of mouth or by nod at all?

A. I think not.

Page 276

Q. Did he use any consecutive words on any single occasion?

xxx A. I cannot remember that he did.

Q. So far as you remember, he did not?

A. Yes.

Q. Now you are recorded there to have stated that in your opinion Mr. Fayerweather, the decedent, your uncle, was of sound mind, memory and understanding.

Now I ask you whether in your opinion he was of sound mind, memory and understanding?

A. No, I don't think he was.

Q. Well, upon what do you base that opinion?

A. Well, I think that at the time he signed this paper he was dying.

Q. Now you spoke—well, now then let me ask you, Miss Joyce, how is it that you signed that deposition in which you are recorded to have stated that he was of sound mind memory and understanding?

F. 909

A. I signed without giving it any thought at all.

Q. You were called upon with the other witnesses to sign it?

A. Yes.

Q. At the Surrogate's office?

A. Yes.

Q. Were you attended by any lawyer of your own selection at that time?

A. Mr. Browning sent up after me.

Q. What is that—I did't hear you?

F. 910

A. Mr. Browning was sent up to the house after me.

Q. And you obediently followed?

A. Yes, (the witness laughed.)

Q. But except gentlemen from the office of Mr. Ritch—by gentlemen from the office you were not aided or consulted by anyone, were you?

A. No, sir.

Page 284.

By Mr. Parsons:

Q. Are you not mistaken in your recollection that you were called into the front room of the second story after Mr. Browning and Mr. Grout arrived.

A. Were you not there at the time when they came

into the room, were you not sitting there at the time, with your aunt, Mrs, Fayerweather, and your aunt, Miss Amelia Joyce?

A. No, I was not.

Q. Do you feel quite sure about that?

A. Yes.

Q. Do you mean to think you cannot be mistaken?

A. Yes.

F. 911

Q. And these gentlemen came up by appointment to attend upon the execution by Mr. Fayerweather of a codicil to his will?

A. Yes.

Q. And you had been informed between 10 and 11 o'clock in the morning that you were to be a witness?

xxx A. I knew that Mr. Vaughan had gone out to find —at least I supposed he had gone out to find some witnesses—to get witnesses down town.

Q. Witnesses to what?

A. To this codicil, that day.

F. 912

Q. To be executed when?

A. Well, I supposed it was all executed. I didn't know anything about it. I was simply told that he was going to get some witnesses and I was to be the third one.

Q. Well, did you not understand that sometime during the day that the codicil was to come there, and that it was then to be executed, and that you were to be a witness, and that these other persons, with Mr. Vaughan, that they were also to be witnesses?

A. Yes.

Q. How early in the day did you understand that?

A. I think that it was between 10 or 11 o'clock, sometime, as I say.

Page 286

Q. Miss Joyce, if I understand you correctly, while you were in the room nobody asked why Mr. Browning and Mr. Grout were there, or what they came for, or made any inquiry about the business that was to be transacted.

A. No.

F. 913

Page 287

xxx A. I don't know that anyone asked me to go particularly, except that they said everything was ready and we would go into the room now.

Q. Who said that everything was ready?

A. I can't remember.

Q. I should like very much to know when you say —whether you can recall who it was that said everything was ready?

A. No, I have no recollection at all who it was that said that.

Q. Was this while Miss Amelia Joyce and Mrs. Fayerweather were in the room?

F. 914

A. Yes.

Q. There to do what?

A. To sign this codicil?

Q. To sign that codicil?

A. Yes, sir.

Page 288

Q. When it was said by somebody while you were together, what, if anything, did Mrs. Fayerweather say?

A. I don't know that she said anything.

Q. Well, can't you recall this that she made no objection or remonstrance or raised any question of any kind?

A. She didn't while I was in the room.

Q. Did Miss Amelia Joyce make any objection or remonstrance or say anything by way of opposition?

A. Not while I was there.

F. 915

xxx Q. When last prior to your going into Mr. Fayerweather's room was he seen by Mrs. Fayerweather or Miss Joyce or both of them so far as it came under your observation?

A. Well, I don't know, but they had just come from the room. I was upstairs and so I don't know—I had been upstairs the greater part of the morning.

Q. Well, do you know this, that the communication between the two rooms was by this passage way?

A. Yes.

Q. And that Mrs. Fayerweather and Miss Joyce were constantly in and out of Mr. Fayerweather's room?

A. Yes.

Q. Was that so, both up to the time of the execution of the codicil and after the execution of the codicil?

F. 916

A. Yes, one of them was with him all the time.

Q. All the time?

A. Yes.

Q. Do you mean that they alternated?

A. Yes.

Q. And were there any times when both of them were in the room with Mr. Fayerweather at the same time?

A. Yes.

Page 289

Q. Where did the pen and in come from?

A. It was on the table at the bedside.

Q. Who brought them?

A. I think I took the pen and ink in.

Q. Can't you be more positive than that than to say that you think you did. Don't you know whether you did or not?

A. Well, I am pretty sure I did.

F. 917

Page 290

Q. Are you quite sure that the ink was in Mr. Fayerweather's room—didn't you take it from the sitting room?

A. I took it from the sitting room to Mr. Fayerweather's room.

Q. At the same time that you went with Mr. Grout and Mr. Browning?

A. No, I went back for it.

Q. And then you brought the ink and pen as well to Mr. Fayerweather's room?

A. Yes.

Q. What did you do with it?

F. 918

A. I put it on the table.

Q. Who put the pen in Mr. Fayerweather's hand?

A. Mr. Grout.

Q. I beg your pardon, I didn't hear you.

A. Mr. Grout.

Q. And didn't you hand it to him?

A. No.

Q. I wish you would reflect for a moment and then tell me whether you didn't put the pen in the ink stand and take it out and yourself hand it to Mr. Fayerweather?

A. I put the pen in the ink stand and handed it to Mr. Grout and he handed it to Mr. Fayerweather.

Q. Are you quite sure of that?

A. Yes.

Q. Miss Joyce, do you mean that the Surrogate shall understand that knowing as you did that to properly make a codicil required that Mr. Fayerweather shall be competent and know what he was about and be free from restraint that the will you were making an appointment to be a witness to and attending as a witness, there was no doubt in your mind that Mr. Fayerweather was able to execute this codicil?

F. 919

A. At the time I signed that codicil I didn't think anything about it at all whether he was able or not.

Q. Yes; but am I not right in assuming this, that at that time you had no doubt upon the subject?

A. I hadn't given the subject any thonght.

Page 292

Q. What do you say—the point of it is whether at that time you had any question whatever in your mind about the propriety of the action in which you had taken part?

F. 920

A. No; I don't think I did.

Q. Miss Joyce, when was it that you learned that you were to be a witness in support of the probate of that codicil; when first?

A. I don't remember.

Page 298

Q. Yes; but the point of my inquiry is whether you understood that you were swearing to the truth of it, did you?

A. Yes.

Q. This was the first experience of yours, wasn't it?

A. Yes.

Page 312

Q. You said when you were previously examined that you were introduced to Mr. Grout and Mr. Browning. Who introduced you on that occasion?

A. I cannot say.

Q. Have you no impression on the subject.

A. No, sir; I have no idea who introduced me.

Q. Must it not have been either Mrs. Fayerweather, Mr. Vaughan or Miss Amelia Joyce?

F. 921

A. It must have been one or the other, but I cannot say which one it was.

Q. Cannot you remember which one it was?

A. No, sir.

Q. What was said to you about them in the introduction of those gentlemen to you; what was said in explanation of their being there?

A. I heard beforehand that they were coming up—that some one was coming up.

Q. For what purpose?

A. To be the witnesses to this codicil.

F. 922

Q. And was not something said that informed you that those were the gentlemen who were to be the witnesses to the codicil?

A. No, sir.

Pages 314-315.

Q. Yes, but I am referring to this particular question when you were all talking in the sitting room immediately before you went into Mr. Fayerweather's bedroom, when the execution of the codicil—when somebody said that everything was ready. Are you not satisfied in your mind, remembering what I have called your attention to, that it must have been either Mrs. Fayerweather or Miss Amelia Joyce who said that?

A. No, I dont think so.

Q. Who do you think that was?

A. I think it must have been Mr. Vaughan.

Q. Mr. Vaughan, you say?

A. Yes.

Q. Now, why do you think it was Mr. Vaughan?

A. Because he was attending to the business.

Q. And were not Mrs. Fayerweather and Miss Joyce also attending to the business?

F. 923

A. No, they hadn't anything to do with it.

Q. What duties in that household were discharged by Miss Amelia Joyce?

A. She had charge of most everything. Mrs. Fayerweather was not able to do anything herself.

Page 317.

Q. What brought to the attention of those concerned that there was neither pen nor ink there?

A. I think Mr. Grout asked for one—I think he asked for a pen and ink.

F. 924

Q. Asked who?

A. Asked me if I would get a pen and ink for him.

Page 320

Q. When you reached Mr. Fayerweather's room who first spoke to him?

A. Mr. Grout, I think.

Q. What did Mr. Grout say?

A. I don't remember.

Q. Can you remember whether Mr. Fayerweather spoke to Mr. Grout or bowed to Mr. Grout upon his entering the room?

A. I think he nodded to him, though I cannot be positive.

Q. Now can't you recall what even Mr. Fayerweather said to Mr. Grout, or Mr. Grout said to Mr. Fayerweather, immediately succeeding this recognition?

A. I think Mr. Fayerweather said nothing.

Q. After Mr. Grout in some way or other explained in some way what took place. Did Mr. Grout proceed to read the codicil?

F. 925

A. I think he did.

Page 221

Q. When he was sitting up in bed were his feet on the floor?

A. No, they were not on the floor, they were out of the bed.

Page 222

Q. How long did he remain sitting on the side of the bed in that way?

F. 926

A. Just long enough to sign his name to that paper.

Q. And what did he do then?

A. He laid back against the pillow that he had been propped up with.

Q. What do you say to that—did he draw himself back into the bed—and the legs went into the bed when he had signed?

A. No, I don't think he did.

Q. You say that Mr. Fayerweather, of his own accord, raised himself and turned himself in bed. Did he do that without assistance?

A. I think Mr. Grout helped him, though I cannot say surely.

Q. Have you any recollection that Mr. Grout aided him?

A. As I remember it now, it seems as if he did.

Q. Do you feel at all certain about your recollection on that subject?

A. Quite sure.

Q. I didn't hear you?

A. Quite sure.

Page 323-324.

Q. Doesn't it come down to this, that while you think Mr. Grout assisted Mr. Fayerweather, your recollection fails you in that respect?

F. 927

A. I feel quite sure about it, as I said.

xxx Q. Don't you recall that at the time that Mr. Fayerweather signed his name to the codicil he made some remark about it?

A. To this last codicil.

Q. Yes, to the last codicil?

A. No, sir.

Q. Didn't he say, pshaw, or in some way express dissatisfaction with his signature?

A. No.

Q. Have you any recollection about that?

A. I think he didn't.

F. 928

Q. So I see. But I want to ascertain whether you have any recollection about it?

A. Yes I have.

Q. Don't you remember that Mr. Fayerweather said either this or something to this effect, pshaw, or that he expressed dissatisfaction, that he grunted or used the word pshaw—that isn't a very good signature, and Mr. Grout saying to him that it doesn't make any difference whether it is good or not?

A. I don't remember it.

Q. And did you know what it was that prevented the witnessing of the execution of this codicil by the doctors?

A. I think Mr. Vaughan didn't wish to have the doctors for witnesses.

Page 328.

Q. When did Judge Beardsley reach the house on November 15th?

A. The latter part of the afternoon.

F. 929

Q. Were Mr. Vaughan and Judge Beardsley together after Judge Beardsley's arrival?

A. Yes, I think so.

Page 331.

Q. Was that the first you had heard about it?

A. When the doctor was there in the morning he said that he would probably not live through the day.

Q. Did he say so to you?

Mr. Coudert: The morning of the 15th.

Witness: Yes.

Page 357.

Q. What was your uncle's condition as to eyesight at the time of signing that codicil?

F. 930

A. It was very poor.

Q. It had been poor for a long time, had it not?

A. Yes, sir.

Q. And how was his hearing?

A. He was quite deaf.

Q. You took the pen, I understood you to say, and handed it to one of these gentlemen from Mr. Ritch's office, Mr. Grout.

A. Yes, sir.

Page 358.

Q. Did Mr. Fayerweather take it from Mr. Grout's hand?

A. I think Mr. Grout placed it in Mr. Fayerweather's hand.

Q. Now refresh your memory with all that has passed to-day, and when you went on the stand heretofore—are you able to state to the Surrogate whether or not Mr. Fayerweather was able to see sufficiently to place the pen at the right place on the paper?

F. 931

A. No, he was not. Mr. Grout had to place his hand where he wanted him to begin.

Q. Mr. Grout took his hand and placed it at the right spot where he was to affix his signature—is that what you mean to say?

A. Yes, sir.

Q. And have you now stated all that you remember with regard to that?

A. Yes, I think I have.

Q. Have I understood you correctly to say that one of his limbs was outside of the bed whan he signed it, or was it both?

F. 932

A. Just one.

Q. Was it in that condition when you entered the room, or did he put one foot out when he was called upon to sign the codicil?

A. He put one out when he sat up to sign the codicil.

Q. Did he do that after Mr. Grout had placed his hand upon the paper?

A. Before I think.

Page 359.

Q. Well, Miss Joyce, I understood yon to say, and so did the learned Surrogate, that Mr. Vaughan was attending to the business.

The Surrogate: I have it precisely here on my minutes (reading): "I think Mr. Vaughan made the remark 'everything is ready;' he was there attending to the business." That I wrote down at the time she spoke the words.

Q. Now Miss Joyce, please explain what you mean, this being settled?

F. 933

A. Why, I understood that Mr. Vaughan had found some mistake of Mr. Ritch's and was trying to right it for Mr. Fayerweather.

Q. That Mr. Ritch had made somə mistake which Mr. Vaughan was trying to make right?

A. Yes, sir.

Q. He was trying to make it right by that codicil?

A. Yes, sir.

A. Why, I heard Miss Joyce say that Mr. Ritch had made his mistake in some part of the will, and that it had been discovered and Mr. Vaughan was trying to make it all right.

F. 934

Q. When did you hear that for the first time—when the codicil was made—was it about the time when—

Page 361

A. It was either a day or two before.

Q. Before you went to sign the codicil?

A. Yes, sir.

A. Do you know whether Mr. Vaughan was around the house during this period?

A. Yes, he was.

xxx Q. You stated in answer to a question of mine, I think, that you did not consider him competent, because you thought he was dying. Upon what did you and do you base that belief?

A. Why, I know that he was failing, and I heard afterwards that the doctor said he was dying from the night before.

Q. When you say "the doctor," what doctor?

F. 935

A. Dr. Vedder.

Q. He was attending physician of Mr. Fayerweather?

A. Yes, sir.

Page 362

Q. There was no question about that, of course. Well, before you saw him intermediate the visit of the fourteenth and that of the fifteenth, before you saw him on the 15th, had anyone told you that there was a great change, or did you first discover it yourself?

F. 936

A. No; no one told me, I discovered it myself.

Page 363

By Mr. Parsons:

Q. How confident are you of your recollection that Mr. Grout touched Mr. Fayerweather's hand?

A. I am very sure of it.

Q. Well, suppose Mr. Grout should say that he did not, are you so sure as to be willing to contradict him?

A. Yes, sir.

Q. You still think that you were right about it?

A. Yes, sir.

Mr. Parsons: That is all.

Exhibit 86.

EXTRACTS FROM THOMAS G. RITCH'S TESTIMONY BEFORE SURROGATE.

F. 937

Page 731.

Q. And did you long before the making of his will know of a general purpose in his mind to make bequests to collegiate institutions, institutions of learning, education?

A. Yes, that I have known for years.

Q. Mr. Hitchcock told us that some period of ten years, as he remembered it, before the execution of this will, when Mr. Fayerweather disclosed some purpose of that kind; do you happen to remember that incident?

A. At the time of drawing the will, prior to drawing the will?

F. 938

Q. No, I mean years before that; that was some six or seven years before; do you remember some years before that that you were aware of the fact that Mr. Fayerweather had intentions to give considerable amounts of money to educational institutions?

A. My recollection is that about 1875 I had a talk with him with regard to the matter.

Q. In which he evinced his interest in institutions of learning?

A. Yes.

Q. And his purpose of benefit that. And so far as you know did that purpose continue through his life?

A. Yes.

Page 732-3.

Q. General Woodford testified that he advised you that Mr. Fayerweather should give a recognition of the possible invalidity of that residuary provision in the will. Do you remember, that?

A. I don't recall that he suggested it; I only know that the memorandum was prepared by me and signed, having that in view.

F. 939

Page 733.

A. My recollection is, that knowing the law with regard to the sixty-day provision, and the half provision, that I talked it over with Mr. Fayerweather at an early day in the connection with our talk about the will, and that prior to going over the draft with him—this is the only definite recollection I have of any talk with anybody about the law—I recollect asking Mr. Hitchcock to get me the law so that I could have it to read to Mr. Fayerweather on one occasion.

Q. Did you read it to Mr. Fayerweather?

A. Yes.

F. 940 Page 734.

Mr. Hitchcock testified that at the time of the execution of the will, just after the will was executed and while he was waiting to see if anything more was wanted of his, Mr. Ritch "just dashed off a note on a piece of letter paper, which he wrote and then read aloud, then Mr. Fayerweather read it and signed it, placing it on Mr. Ritch's desk, and signing it there." (Handing witness a paper.) Do you remember the paper; that is it, isn't it Mr. Ritch?

A. Yes; this is the paper.

The Surrogate: That is exhibit what?

Mr. Rollins: Exhibit A, I believe.

Page 734.

A. It is a very strong impression that it was a matter that came to my thought in connection with the execution of the will at that time.

Page 735

xxx Now are you sure, Mr. Ritch, that the attention of Mr. Fayerweather had been called at this time to any other law relative to benevolent corporations than the statute, which makes void a will executed within sixty days of the testator's death?

A. Oh, yes.

F. 941

Page 736.

xxx there was nothing definite stated as to what the first codicil should contain, until our talk about the first codicil in December.

Q. But it was understood that after the lapse of sixty days or thereabouts, a codicil should be prepared and executed?

A. That the sixty days would give him time to determine what he would do for a permanent provision.

Page 745.

F. 942

Q. In these various interviews that you had with the testator leading to the preparation of the first codicil, was it understood between you that the object was to avoid the effect of the statute of 1860?

A. The object that he stated was a double one. The principal object was this, as he stated it to me: That he had made his list of the institutions to which he wished to give a certain amount of money. That he could not tell whether under all circumstances which one of these institutions, otherwise deserving, would have a

legal claim against executors. He said that he wanted his money to go them if they were otherwise deserving, independently of legal considerations, and that an object that he had in making the codicil was that he would feel free in each case to see that these different amounts got to the institutions to which he intended to give them.

Page 746

Q. At the time of the execution of the will, and at the time of the preparation of the will the effect of the statute of 1860 was talked about, was it not?

F. 943

A. Yes.

Page 747

Q. What sense would you suggest?

A. That it was desirable to avoid the statute. He signed the paper at my suggestion, stating that there would be no trouble from any of his people simply, so to speak, putting us right in drawing a will of that sort.

Q. What is the sense that you suggest in which it was drawn?

A. That the will, if anybody sought to take advantage of it, was liable to that provision of the law.

Page 750

F. 944

xxx A. My impression is that at that time he had read or knew about the Fiske litigation, and his idea was that he could not determine just what would be the legal position of all these institutions with regard to the money that he had given them, and this is what was stated by him at that interview.

Q. You have not forgotten, have you, that by the ninth clause of the will which disposes of $2,100,000 to colleges, the executors were vested with a discretion to

withhold all or part of any legacy to any particular college, you did not understand that Mr. Fayerweather had found any occasion to depart from that, did you?

A. No, sir; that was intended as a very remote possibility if any one of these institutions should not be found when the time came to give it the money, or if the circumstances were such that it would be a waste of money to give it.

F. 945

Q. You did not understand that when he talked about executing another testamentary paper that he had abandoned the purpose which he had declared in the ninth article of the will?

A. The ninth article of the will was to stand just as it was.

Q. Well, he did not mean, as you understood it, to depart from it in the slightest particular?

A. No, sir.

Q. Then I don't understand what you say he sought to accomplish by that codicil?

A. He expected that these colleges would, with the care that he had taken in making up the list, be entitled to receive $2,100,000, and he wanted that they should have it.

Page 751

Q. Why did he want the codicil?

F. 946-

A. We were simply executors, and there might be a college which would not have a legal right to this money. Individuals, having the right to use the property as we liked, we could see that they got their money.

Q. How could it happen that a college might not have the right to claim its money? What was in your mind as to that?

Mr. Arnoux: We object as to what was in Mr. Ritch's mind.

Q. Well, what did Mr. Fayerweather say about it then? I will change the question.

A. The impression that was left on my mind was, that a special reason for it would be that under its charter it could not take more than it had, so that possibly an act of the Legislature might be necessary to give it the right.

F. 947

A. The surplus of that one-half was not, I am confident, in the mind of Mr. Fayerweather in connection with this matter at all at the time. There was another reason which was given with regard to this matter, and that was with regard to the relations of the family. The relatives of Mrs. Fayerweather he had a distrust of, and his wife too. He spoke of that in connection with, I think, this codicil, then or later, but the controlling influence at the time this codicil was made was what I have stated, the greater freedom that would be given to Mr. Bulkley and myself to see that these institutions got the money that he intended to give them.

F. 948

Q. Mr. Ritch, are you sure that anything was said by Mr. Fayerweather about Mrs. Fayerweather's relatives, and his dislike to them, in connection with this first codicil?

A. I won't be sure; it is merely an impression.

Page 752

A. He wanted the discretion the other way. If they could not legally take that, we would be in position to give it to them.

Q. So that all the reason that was assigned by Mr. Fayerweather for making this codicil, so far as regards the disposition of his residuary estate, was in order that you

might enlarge the bounty to particular colleges beyond the sum that they would be competent to take?

A. Within the limits of the will. If an institution was entitled to $50,000 he wanted it to get $50,000, if it was deserving, without regard to legal defects. An executor would not feel at liberty to do it; an individual owner of the money would.

F. 949

Page 753.

Q. But, Mr. Ritch, you have said that it was the competency of the institution to take that was the subject of the discussion, and that was the reason of the change. Tell me how an institution would be competent to take anything from you that it could not take from Mr. Fayerweather?

A. An institution that under its charter could not legally take. Take Cornell for instance.

Q. How could it take from you what it could not take from Mr. Fayerweather?

A. We could hold the money as individuals, and get an enabling act from the Legislature.

Q. Was that talked of between you and Mr. Fayerweather together, the enabling act from the Legislature, or has it just occurred to you?

F. 950

A. That had been in my thought in connection with the talk I had with him.

Q. Did Mr. Fayerweather say anything like that?

A. It is my impression that this talk brought in the Fiske controversy, that was one element in the conversation. It is long ago and I can't remember the words, but I have given you faithfully the substance of the talk.

Page 755.

Q. I don't know how far you mean to qualify, but

I understood you to state before that the object of making this codicil was in some way or other to provide that educational institutions should get benefits that they would not get under the will?

A. What I mean to say is this, that by the $2,100,000 there was an understanding on both Mr. Fayerweather's part and mine, in addition to what was prior to that, that the object of this thing was to provide more surely that they would get that money. Whatever there might be beyond that, nothing was said at any time—at that time.

F. 951

Q. You qualify "at any time", by saying "at that time"?

A. At that time; yes.

Page 756.

Q. What do you mean by unspoken confidence?

A. I mean a gift to us as absolutely for our own as if I was to give you the money without suggestion.

Page 756.

Q. But what was there to put you upon your honor?

F. 952

A. Nothing except what appears upon the face of that codicil.

Page 757.

Q. And you had no idea that he thought you were taking that in any sense as a trust?

A. I think that he very clearly understood that we not taking it as a trust.

Q. Please answer that question Mr. Ritch.

A. I don't think I had any thought about it at the time except that it was proof of confidence in my own

There was no residuary estate to make it a practical question then.

Q. Let me call your attention to this — if Mr. Paywrether had no residuary estate at that time, and had died before the execution of the first codicil the operation of the Statute of 1809 would have been to reduce this gift to collegue to the extent of over a million of dollars, wouldn't it?

F. 283

A. It would if the will had been contested.

Page 286.

Q. Then tell me how it is, Mr. Birch, if that be the case, that the effect of the codicil was to give nothing to the residuary legatees, would it have given them the million of dollars in the event you have suggested?

Objected to as hypothetical.

Objection overruled.

A. It is rather my impression that Mr. Bulkley and I would not have contested the will.

Page 288.

Q. Do you know was anything said between you and the testator as to whether Mr. Bulkley should be advised of the fact that he was made a beneficiary of the residue?

F. 284

A. I think Mr. Paywrether at that time said that he did not intend to say anything to him about it.

Q. Did you advise him on that subject?

A. I did not.

Q. You know that, in fact, Mr. Bulkley was not advised, don't you?

A. So Mr. Bulkley has told me since.

Q. Did you have any conversation with Mr. Bulk-

ley from time to time between the date of that codicil and Mr. Fayerweather's death?

A. I had conversation with him, but never mentioned the will or codicil to him.

Q. You never mentioned the fact that he was named as an executor of the will even?

A. No, sir.

F. 955

Q. Was there any understanding between you and Mr. Fayerweather as to whether or not that subject should be mentioned?

A. No, sir.

Q. Whether Mr. Bulkley should or should not be advised that he was an executor?

A. No, sir. Oh, Mr. Fayerweather told me that he had spoken to Mr. Bulkley about being executor, I think.

Q. Well, about being residuary legatee?

A. No, sir.

F. 956

Q. Did you suggest to Mr. Fayerweather that if it was his purpose to make you the beneficiary of half the residue of his estate it would be well for him to get some other lawyer to draw his will or his codicil?

A. No, sir.

Page 760

A. You said nothing to him about what you should do if you should get a portion of this residuary estate?

A. Nothing.

Q. Not by direct expression, and not indirectly?

A. Not by direct expression or indirectly.

Q. No hint or suggestion?

A. No hint or suggestion.

Pages 761–762

xxx A. The only thing that would preclude me from using any money that would come under those circumstances would be my feelings of personal honor to the family and friends of Mr. Fayerweather—what they would think of me if I spent it for my personal uses.

Q. During that period which has been covered by my recent question did you say anything to Mr. Fayerweather about making your own will?

F. 957

A. No, sir.

Q. Did you ever at any time?

A. No, sir.

Q. Are you sure of that?

A. Well, except in connection with that memorandum which was made at the time, there was this conversation, that in case of my death or Mr. Bulkley's death he would like to have it in such shape that the other man would be able to see, to have sufficient say about the matter, so that the two million one hundred thousand should get disposed of in the way he wanted it, to that extent it was a matter of—simply of—I have an indistinct impression that it was a matter of talk.

Page 762.

Q. When was that?

F. 958

A. That was at the time that—some time prior to the execution of the codicil.

Q. Of the codicil?

A. Yes; in connection with it.

xxx A. My recollection is this, that he then said that Mr. Bulkley—that he did not intend to say anything to Mr. Bulkley about it, that it was a suggestion of mine that if the residuary estate should go into Mr. Bulkley's hand and this question of dealing with a particular in-

stitution should become a practical one that some memorandum would be desirable to call Mr. Bulkley's attention to the matter, and in connection with that my recollection is that Mr. Fayerweather said that he would like to have—that is, if at the time of the death of either this money had not been distributed, that he would like to have the other man have the control of the matter rather than the executor of the deceased party.

Q. Now, out of all of that vagueness did anything definite come?

A. The memorandum came.

F. 759

Page 770.

Did he have the original will?

A. No; copies.

Q. Did he ever have the original will or the original codicils, any of them until, I mean the very last of his life?

A. Only as we had them when we were together in consultation at his house.

Q. Well, you have kept those in your custody?

A. Kept those in the safe.

F. 960

Page 771.

Q. You knew what he meant by "the balance of my will"?

A. He always used the word will in expressing the whole thing—the will and codicils.

Page 776.

(Referring to Vaughan's call for the will and codicils.)

Q. Won't you favor us with it?

A. I don't remember the exact words.

Q. Complimentary, were they?

A. They were very earnest words.

Q. Words of praise?

A. They were not conciliatory words.

Q. Words of criticism?

The Surrogate: It is somewhat trifling with the matter. I should like the witness to answer the question and state what was said.

F. 961

A. He said that he wanted those papers himself then, and he said: "Here is a note that directs them in terms to be given to me," and then he said: "There is something about this matter that I do not understand. I think you have made a mistake in drawing these papers as you have them, and I would like to know something about what the meaning of it all is." My reply was that the will and codicils were drawn by Mr. Fayerweather's direction, and were thoroughly understood by him, and the reasons for them were given, and that I did not feel that I ought to talk about them, and that is my own impression of what occurred, and finally as he became more earnest in his effort to get the papers, and as he spoke of having a power of attorney from Mr. Fayerweather.

F. 962

Q. Did he show it to you?

A. No, but I——, he asked * * *

Page 777.

Q. And did you grow white?

A. I regretted to find from that letter that I was not as successful in keeping control of my temper as I thought I was.

Q. You did not know that you grew white?

A. I did not know it.

Q. And if you did, it was with wrath, was it?

A. I felt angry.

Page 794.

Q. Mr. Ritch, I understood you to say that up to the time of Mr. Fayerweather's death, you never at any time had any conversation with Mr. Bulkley recognizing the fact that he was an executor or a residuary legatee under Mr. Fayerweather's will. Is that so?

F. 963

A. That is so.

Q. Pray, tell me if that be so?

A. I know that is so.

Q. Than tell me, if it be so, by what authority you said that "neither Mr. Bulkley nor I would wish to derive any personal benefit under this codicil?

A. I thought I knew Mr. Bulkley well enough to say that, and I was writing a letter with this controlling thought, to comfort a sick man.

Page 797.

Q. Well, did you think he was a sick man and could not think accurately?

A. I assumed from what Mr. Vaughan had said that he was a sick man.

Q. And could not think accurately?

F. 994

A. I didn't know.

Page 806

Q. Between the time of the execution of the first codicil and the time of your writing this letter to Miss Joyce on the 14th of November, (see Exhibit No. 33*a*, Page 224) had you said anything to the testator as to

what you would do with the residuary estate if it came to you?

A. Yes, during March, 1889, we had some talk with regard to it.

Q. Was that the only occasion?

A. The only occasion.

Page 807

(Referring to Vaughan's visit).

F. 965

A. Yes, he said that he had come to have a codicil drawn at Mr. Fayerweather's request, adding himself as a residuary legatee, that it was Mr. Fayerweather's wish. I said that I would attend to the matter, but that I had had an engagement with gentlemen from out of town and that I would take him into General Woodford's room. He went in there with me.

Page 308

Q. Did you ask how Mr. Fayerweather was?

A. I did.

Q. What reply did you get?

F. 976

A. He said that Mr. Fayerweather was very ill that day.

Q. Did he say he did not think he would live the day out?

A. He said that the doctor had told him that whatever papers were to be executed had better be executed during the day.

Page 809.

Q. The Witness: He was evidently impressed by

the fact of Mr. Fayerweather's illness, and was quiet and sobered by the thought of it.

Q. By the thought of his approaching death?

A. That was an off-hand impression that I got.

Page 811.

Q. Now, what were those questions of law that Mr. Vaughan asked you on Friday?

F. 967

A. He said that he did not believe that a man could make, having a wife, could make a will which would permit institutions to take more that half of the property; his remark was that he did not believe that a man could help himself.

Page 813.

Q. Did he put as a question of law to you the very same matter that was put in Mr. Fayerweather's letter, as to what the effect of the clause, ot the residuary clause, of the codicil was?

F. 968

A. He did, either on, I think, on Thursday morning at the couversation that we had with regard to the will, he asked what that meant, and I told him that it meant when it said, that it was an absolute gift.

Page 815.

Q. Do you know why he never said to you, when the circumstances were such that you felt you had—I use your own words—no moral right to treat any portion of the estate otherwise than as you knew would conform to his wishes—do you know why it was that he never said anything to you as to what he wanted you to do?

A. Mr. Fayerweather was one of the most reticent

of men with regard to things which he had no definite purpose to speak.

Q. And he had no definite purpose about this $3,000,000 you think?

A. It seemed just as if he had thrown the matter off his mind and had no further thought to give it until those interviews in March, 1889.

Q. Thrown it off his mind, and into your pocket?

A. Off of his mind.

F. 469

Q. Into your pocket, because so far as any fact between you and him were concerned, there was none that led you to think that he did not mean for you to use that property as you liked?

A. There was nothing whatever said, no hint or suggestion given as to what should be done with any residue.

Page 816

Q. On as to whether you should have it for your own purposes or not?

A. Or as to whether I should have it for my own purposes or not.

Q. Was there any understanding between him and you that you should mutually refrain from having any agreement on that subject?

A. Nothing whatever.

F. 970

Page 837

Witness: I would like to make an explanation or a correction before I proceed to give my testimony. The stenographer's notes and the printed book say that I said Mr. Fayerweather expressed distrust of Mrs. Fayerweather's relatives and of his wife, too. I did not use the word his wife.

The Surrogate: Mr. Ritch did not say that.

Mr. Rollins: I did not so understand you.

Witness: He never expressed any other feeling than that of sincere affection for his wife and desire to promote her interests.

Page 838

The Surrogate: It is a strange misunderstanding by the stenographer.

F. 971

Witness: I desire to say one other thing in that connection. Mr. Fayerweather was accustomed to speak of the Joyce's, and I do, without including Miss Amelia Joyce in my reference in my testimony. I had no thought of including her in that statement, because he always spoke with high regard of her and appreciation of what she had done for him.

Page 839

Q. You did not show to Mr. Vaughan on that day any of these three memoranda?

A. I did not.

Q. Nor did you on that day tell Mr. Vaughan than any of these three memoranda were in existence?

A. I did not.

F. 972

Q. When did you tell him, or rather, nor did you tell him that there was, or ever had been, any paper outside of these testamentary papers in which Mr. Fayerweather had made any expression of his wishes as to what should be done with his estate?

A. I had not.

Q. And you did not part on very good terms, did you—you and he?

A. I was glad to see him go.

Q. You were glad to see him go?

Yes.

Q. Were you glad to see him go on Friday?

A. My impression is that I was not glad to see him come.

Q. I meant come—you were not glad?

A. I was not glad.

F. 973

Page 845.

xxx A. So far as the will and the codicils and the three memoranda left the residuary estate to that extent there would be directions to us to follow those directions as far we would understand Mr. Fayerweather's wishesto be. The will and codicils and memoranda together would leave the bulk of the residuary estate absolutely without any direction. except as they would be aids to memory or throw light on the line of things that Mr. Fayerweather was interested in.

Page 850.

xxx A. I felt that if I could see Mr. Fayerweather for five minutes, that these memoranda—with these memoranda or without, that he would recall the whole thing and that nothing more would be needed.

F 974

Q. Now Mr. Ritch, I will show you a paper which has not been put in evidence yet, Exhibit 6, for identification did you look at the date?

A. What is that?

Page 857.

(Referring to Exhibit No. 28 in Appendix of Exhibits see page 22nd).

Q. I did not ask you for what purpose it was signed for. I call your attention in immediate connection with that paper to this; it says he has made you and Mr. Bulkley his residuary legatees in place of these institutions, these educational institutions, that thereby his intention as expressed in that will was to be carried into effect. When your attention is thus called to the matter, will you swear that it was not the understood object of the execution of that codicil, to evade the statute of 1860, and to provide for some scheme whereby these educational institutions should get moneys which could not have been effectively given them by will?

F. 975

A. The controlling objects of that codicil was to provide that if the institutions named in the will, down to and including the 9th paragraph, that they would get what was given more surely, with a greater freedom, from Mr. Bulkley and myself as residuary legatees than as executors.

Page 857–858

Q. How?

A. I tried to state that last Thursday.

Q. You did not make me understand it; please try again.

A. An individual can—having right to moneys—do a good many things that an executor cannot.

Q. Well?

F. 976

A. If there was an institution that was entitled to $50,000 or $100,000, by reason of being deserving, when we would know that Mr. Fayerweather would want it to have the money and legally could not claim it, as executors we could not give it, but as individuals there would be different ways in which such an institution could get the benefit of what might be given. That is, if

the charter of the institution limited the money to $500-000, and it had got $450,000, and this will provided for $100,000, to it, we would feel free to give it that whole $100,000; and it would be a question whether we could dare go beyond the $50,000, if we were not. In fact we could not.

Page 859

Q. But I thought he said nothing?

A. I said that he expressed his desire that these institutions should get the money that he wanted to give them.

F. 977

Page 860

Q. Were you cognizant of some proceeding brought by my associate, Mr. Coudert, some weeks since, with a view of ascertaining whether Mr. Fayerweather left at his death any instructions with reference to the disposition of his estate?

A. I think so.

Q. Were you cognizant of an opposition to that motion?

A. I think so.

Q. On the ground that there were no instructions?

A. On the ground that there were no instructions as to the residuary estate.

F. 978

Page 862

(Referring to Exhibit No. 28 in Appendix of Exhibits, see page 220.)

Q. I am bound to ask you if you mean to say that you withheld this paper which I hold in my hand, exhibit 6, upon the tneory that it bore no relation to the disposition of the residuary estate?

Q. It bears no relation whatever to the disposition of the residuary estate.

Q. But that it was intended to be limited in its terms to the estate specifically given by the will?

A. Yes; down to the ninth clause.

Q. And that there is not anything here that limits or fetters or restrains the absolute quality of the gift of the residuary estate to you and Mr. Bulkley?

F. 979

A. That was Mr. Fayerweather's interpretation of it in March, 1889.

Page 603.

Q. And all that you interpreted as meaning that the residuary estate was yours and Bulkley's was what you supposed about it?

A. Yes.

Page 607.

xxxx Q. Then he said "I leave this whole matter to you. Look into it. I want to put it into a codicil and with regard to Hampton, Lincoln, Cornell, and the North Western University. Just in case of my death look into them and determine for yourself what is best to do."

F. 980

Page 609.

A. He never mentioned to me the name of an institution outside of the will and codicils, and that memorandum of March 22, 1889, as institutions or persons to whom he wished to make a gift.

(Referring to Exhibit No. 29 in Appendix of Exhibits, see page 230.)

Q. I am very grateful for that information.

Mr. Armour: Except as to the first nine articles of the will there were no instructions at any time?

Mr. Hellier: I am delighted to hear it.

Page 676.

Q. Mr. Birch, that is the letter which I made some inquiry just before recess, as from your office to Mr. Coulter's office. Do you recognize the letter as one that you have seen before?

P. 101

A. I don't remember to have seen the letter before, but may have done so.

Q. What is a letter from your office?

A. Yes.

Q. By whom signed?

A. The signature is Mr. Fisher's hand writing.

Page 677.

Q. Of your firm.

A. Yes.

Q. The signature is the firm signature?

P. 102

A. The signature is the firm signature.

Q. All that I wish to call your attention to is this, the sentence that says: "In order to avoid any misunderstanding, Mr. Birch has submitted to Mr. Parsons, personal counsel to Mr. Barkley and Mr. Vaughan, all these memoranda, and with his concurrence he has proposed to furnish for your inspection, in advance of their

production in Court, all that Mr. Parsons and Mr. Arnoux have selected as not coming within the prohibition of the statute, and if your representative will call on Mr. Fiske at our office this afternoon at one o'clock, they can be seen." That seems to contain an imputation that there were several papers that were thought to be within the prohibition of the statute that you did not think fit to submit for inspection, were there such papers?

F. 983

A. There were papers which Mr. Parsons and Judge Arnoux selected out as coming within the prohibition of the statute.

Q. Of what general character?

A. They are in evidence now.

Q. They have since come into evidence?

A. Yes, they have: the two memoranda received from Mr. Fayerweather, the instructions for the will.

Mr. Parsons: May I make this explanation, that in a case where I had been recently before the Surrogate, he had held that anything in the nature of instructions in the preparation of testamentary papers came within the professional confidence.

F. 984

Mr. Rollins: I make no objection, I simply wanted to find out what they were, and to be sure that we now have all that can be supplied.

xxx A. I had no statement of what the interest of Mr. Fayerweather in the firm was until last week, when I asked Mr. Myrick about it.

Q. Well, you knew in a general way, didn't you?

A. In a general way there was a statement made to me, but without detail then, that the estate would be probably over five millions.

Q. And if your attention had been called to it you would have understood it that to the extent of say two million dollars or thereabouts, the will not supplemented by the codicils, would have been ineffectual if contest was made on account of the statute of 1860?

A. If contest had been made the statute of 1860 would have been applied to the will without the codicils.

Q. And to the extent, I say, of something like two million dollars?

A. Yes, that would be a rough estimate.

F. 985

Q. You did't say that to Mrs. Fayerweather or to Judge Beardsley or to anyone else interested in the estate, did you?

A. I did not.

Q. Did you put, in conversation with any of them, a construction upon that clause of the codicil which constituted Mr. Bulkley and yourself the beneficiaries of the residue?

A. I don't remember that I did.

Q. Did you say to them, or any of them, that although that gift was in form absolute you did not expect or intend to use any of it for yourself?

A. I don't remember such statement.

Q. And that you had no right to do so?

F. 986

A. I rather thought that Judge Beardsley, from his conversation with me, took it for granted that it was a matter for me to use my best judgment.

Q. In keeping or giving as you pleased?

A. In keeping or giving as I pleased.

Q. Keeping for yourself or giving as you pleased?

A. In keeping or giving within the limits of what a man who would seek the approval of Mr. Fayerweather's relatives would do.

Page 879

xxx A. Our whole talk was upon the assumption that this was in our hands to do with as we liked as to the great bulk of it.

xxx A. I also stated to Mrs. Fayerweather and Miss Joyce what will complete all that I recollect in regard to conversation as to what might be done with the money.

F. 987

Q. You didn't offer to show any of them any of these memoranda?

A. No, sir.

xxxx A. And then following this reply, he said that it would be right for his wife, and best for her if he put the house and stable into a trust for life, and then further conversation occurred.

Q. What was it?

A. He asked me what I thought of that, and I told him that under the circumstances it seemed to me that the statement that he made as to the reasons were to protect his wife from annoyance. I said that I thought he had better leave it as it was; that a woman liked to feel that her home was her own, and he then said, well, I will leave it so. After my death you will see Mrs. Fayerweather and explain the situation to her and also my wishes.

F. 988

Q. Well, do you find anything in that that indicates that you were to increase her annuity beyond fifteen thousand dollars?

A. Some various talks with him with regard to his wife, including his expressions of desire that she should be absolutely kept from any anxiety about money mat-

ters, I felt that anything that was wanted for her comfort we had absolute right to give her.

xxxx A. If I were, so to speak, his other self standing in his shoes, it would be the right thing for me to see that the widow of my friend putting this confidence in me should not have a thought of anxiety.

Exhibit 87.

F. 989

EXTRACTS FROM BRADFORD W. HITCHCOCK'S SURROGATE'S TESTIMONY.

Page 79.

Q. If you will go sure, that is all we want.

A. And Mr. Ritch made the suggestion, and said it was Mr. Fayerweather's wish that my father should be consulted again.

Q. About what?

A. About the disposition that he should make of his property. He wanted to give it away in his will for colleges and benevolent institutions.

Q. This you got from Mr. Ritch?

A. Yes, sir.

F. 990

Page 80.

Q. Did he go to Mr. Ritch's office?

A. He came down to the office and Mr. Ritch and my father and I went out to lunch together and it was talked over at the lunch table.

Q. Where was that, Mr. Hitchcock?

A. I think it was in Delmonico's down in Beaver street.

Q. And then did you three consult in regard to this and determine what should be done with the money?

A. Well, Mr. Ritch had a list of quite a number of colleges and he wanted to know what my father thought of them.

F. 991

Q. Well, had your father given him that list or had your father helped him to make up that list?

A. No, sir; not so far as I know; he had not.

Page 242.

Q. And until you saw this codicil that you have just been testifying to in answer to Judge Rollins' question, you did not know that the benefits that your college and others were to receive under the residuary clause had been all bodily transferred to them, that is to your principal, Mr. Ritch, and to Mr. Bulkley, did you?

A. Well, no, of course not.

Page 247–8

Q. And you also stated that you have been informed that the codicil was in contemplation?

F. 992

A. Yes, sir.

Q. Can you now remember by whom you were so informed?

A. By Mr. Ritch.

Q. What did he state on that subject?

A. He said that after sixty days had elapsed from the making of the will there would be a codicil?

Q. When did he say that?

A. I think it must have been either just before the will was signed or directly afterwards.

Mr. Arnoux: You mean the codicil?

The Witness: No, the will.

Q. What did you say?
A. I made no reply at all.

F. 993

Q. Is that all that he said? In connection with the sixty days did he say anything further, why not 90 days or 120 days?

A. He made no remark at all, but I understood him to refer to the law of 1848 and the laws amending it.

Page 248

xxx Q. Then all that Mr. Ritch said to you on that subject at the time of the execution of this will, to the execution of which you were a witness, was "in sixty days a codicil will be made," and you inferred from that that it was in connection with the legal impediments created by that Legislature?

F. 994

A. That the 60 days was?
Q. Yes?
A. Yes, sir.
Q. Was anything further said by Mr. Ritch to you upon that subject?
A. Of the sixty days?
Q. Yes.
A. No, sir.
Q. Or of the codicil?
A. Well, we discussed the law of 1860.
Q. Who is "we"?

A. Mr. Ritch and myself.

Q. In connection with this will and codicil?

A. Yes.

Q. Now tell us what was said in this discussion?

A. I made a study of that law and I called Mr. Ritch's attention to it and to the fact that Mrs. Fayerweather being still alive the bequests for charitable purposes over fifty per cent of the net estate would not be valid, and Mr. Ritch's reply was that the family doctor had informed Mr. Fayerweather that his wife probably had a fatal malady, and was not likely to live over two years, so it did not make much difference.

F. 995

Q. Money enough for a dead woman. Well, is there anything else?

A. I don't remember anything else.

xxxx Q. Did you do any looking up of the law?

A. Except in that I looked up the law of 1860, and followed it down. Birdseye's book was not out yet.

Q. Did you report that to Mr. Ritch?

A. What I have already said. Well, I enlarged on it, and said that the law had not been modified that I could see, and that it was still the law that if a man had a wife or parents or children, that anything over fifty per cent. would not hold.

Q. What did he say to that?

F. 996

A. Well, he made these two remarks in regard to Mrs. Fayerweather's health, and second with regard to the sixty days.

Q. Well, that a codicil would be made at the end of the sixty days?

A He said after sixty days have passed there will be a codicil.

Page 250.

Q. And so far as you know this codicil was the same codicil that he contemplated when he spoke to you, is that so?

A. Yes, sir.

Q. Did anyone else look up the law in the office, that you know of?

A. I think Mr. Foster did.

Q. At whose request?

F. 997

A. I think Mr. Foster came to me and said he had an idea there was an old law which would conflict with that will, and I think he came to me afterwards and said he had looked it up. That put me to looking it up myself. I knew there was a law, but I had forgotten what it was about.

Q. And whatever was the result of that examination you reported to Mr. Ritch?

A. Yes.

Q. Can you state, Mr. Hitchcock, how long before the execution of the codicil this was?

A. Well, I meant to say, when I first answered you, that I could not remember whether it was before the will was signed or afterwards. I think it is very likely it was before the will was signed, because that paper was folded in the will.

F. 998

(Referring to Exhibit No. 27 of this Appendix, page 220.)

Q. And that paper embodied the result of your investigation as communicated to Mr. Ritch, that paper Exhibit A, did it?

A. Well, as nearly as I can remember it was a request of Mr. Fayerweather's that if there was anything

in the will that could not stand in law, that his heirs-at-law would respect what was his previous intention.

Q. That was a part of it. The paper also states—I am speaking from memory—that he had been informed with reference to the legal obstructions in the way of carrying out his wishes.

A. I had forgotten that, but that makes me think of what I said to Mr. Ritch.

F. 999

Q. Then your present recollection is that before the will was actually executed the codicil was in contemplation?

A. I think it is very likely; yes sir.

Q. Which was intended to remove the difficulties. I am speaking now of your communication to Mr. Ritch, of the result of your investigation, and of his statement that the codicil was intended to be made. Did you understand from what he said that the codicil was intended to remove the legal difficulties in the way of Mr. Fayerweather so far as his desire to leave the residue of his property to institutions was concerned?

F. 1000

Page 251.

xxxx A. My idea was from what Mr. Ritch told me, that the codicil was to be drawn so that the will would be in legal form and not in conflict with the law.

Exhibit 88.

EXTRACTS FROM DR. MAUS R. VEDDER'S SURROGATE TESTIMONY.

Pages 369-370

(Referring to the Codicil of November 11th, 1890, destroyed by Vaughan.)

F. 1001

Q. That is, you and Dr. Wilcox went away from the bedside?

A. Yes, sir. And the lawyer kept on reading and then I interrupted and asked if it was necessary for us to listen, as I thought it would annoy Mr. Fayerweather to know that we were there, and tne lawyer said no, it was not. While he was reading Mr. Fayerweather interrupted the lawyer and said to him "re-read that," or words to that effect, and the lawyer kept on reading. I did not understand what it was. Finally Mr. Fayerweather said to the lawyer, "as I understand it, it is after everything ie paid and everybody satisfied, the balance or what is left goes to the different institutions, and each to receive their share. He directed his conversation mostly towards myself and then towards the lawyer.

F. 1002

Q. That is all you heard Mr. Fayerweather say?

A. Then, after that, we executed the codicil.

Page 374

(Relating to the dying day codicil.)

Q. I want to carry your attention now to the 15th of November. That is the day upon which the last codicil is executed and the day upon which he died.

A. Do you remember any conversation with Mr. Vaughan on the day that he died?

A. Yes, sir.

Q. At what time in the morning or in the day?

A. Between 11 and 12 o'clock.

Q. Did you at that time state what the condition of Mr. Fayerweather's health was to Mr. Vaughan?

A. That I could not answer.

F. 1003

Q. Without stating what you said what was said as to his condition?

The Surrogate: You may answer yes or no.

A. Yes, I did.

Q. Did you or did you not state to Mr. Vaughan that if any paper was to be executed it should or should not be executed at once?

A. Yes, sir.

Q. What did you say about that subject?

A. What you have repeated, that no paper, or rather that any paper to be signed must be signed at once.

Page 375.

Q. Did you tell him why?

F. 1004

The Surrogate: You may say yes or no to that.

A. Yes.

Page 378.

Q. With reference to the codicil of that followed on the 15th, have you any knowledge of that?

A. None whatever.

Q. Did you ever know that such a codicil was in contemplation?

A. I did not.

Q. Weren't you asked to be a witness?

A. I was asked to be a witness, but not to anything—not to a codicil particularly, but to witness something.

Q. Who asked you to be a witness to something?

A. Mr. Vaughan or Miss Joyce, I am not positive who was present.

F. 1005

Q. Well, didn't you understand that it was some testamentary paper that was to be executed by Mr. Fayerweather?

A. No, I don't know that it was. It was merely a request to be present as a witness at 4 o'clock.

Q. At Mr. Fayerweather's house?

A. Yes, Dr. Wilcox and myself, in order to witness something.

Q. Was Dr. Wilcox also asked?

A. No, I was requested to ask him.

Q. And you did ask him?

F. 1006

A. Yes.

Q. What did you ask him to do?

A. To be a witness, to be present at Mr. Fayerweather's house at 4 o'clock to witness something.

Q. When did you give that notice to Dr. Wilcox?

A. On the 15th.

Page 379

Q. At what time of the day?

A. At noon.

Q. Was that immediately after getting the notice yourself?

A. No, I was notified then and there by Mr. Vaughan or Mr. Joyce—those were the only two that were present. It was understood between us.

Q. Well, did you understand it was a paper to be executed by Miss Joyce?

A. No, by Mr. Fitzwoulfhet, but the nature of the paper I did not understand.

Q. It was a paper to be executed by Mr. Fitzwoulfhet?

A. Yes.

Q. Did you appear there as a witness?

F. [illegible]

A. I did not.

Q. Why not?

A. Because I was notified that it was not necessary.

Q. By whom?

A. By the servant in my house.

Q. Well, was it by word of mouth or by letter?

A. No, word was left that we need not attend.

Q. Well, who left the word?

A. A messenger from Mr. Fitzwoulfhet, or rather from Mrs. Fitzwoulfhet. Anyhow a message was left.

F. [illegible]

Q. A messenger from Mr. Fitzwoulfhet's house came to your house which told that you need not be present?

A. Yes.

Q. The messenger came to the witness' house was that so?

A. Yes, came to my house—a message was left at my house that we need not appear.

Q. You say it was left at your house. Was it a written message?

A. No, sir. A verbal message.

Q. Was it delivered to you personally?

A. Yes, to the servant.

Q. Your servant?

A. Yes.

Q. Then you learnt through the medium of your servant that you were not needed as a witness at Mr. Farnsworthy's house that afternoon.

A. Yes, sir.

Q. You don't know who started this notion first in motion, do you?

A. No, sir, I don't.

Q. Well, did you give notice to Mr. [illegible]?

[illegible]

A. [illegible]

Q. Well, what did you say to Mr. [illegible]?

A. That we had notice not to appear, that we need not go to Mr. Farnsworthy's, that there was no doubt that Mr. Vaughan had brought two other witnesses. Now, that message may have been written. I don't remember it.

[illegible]

Q. The message was that you were not needed at Mr. Farnsworthy's because Mr. Vaughan had brought two other witnesses?

A. Yes, sir.

[illegible]

Q. Did you visit him in the morning, the morning?

[illegible]

A. Between 11 and 12 in the morning — at 7 and at 12.

Q. Did you speak to him?

A. Yes.

Q. Have you any objection to giving his address?

A. [illegible]

Q. Yes.

A. Well, I merely asked as to his condition. He was not in a condition to talk.

Page 386.

Q. Doctor, at what hour of the morning of the 15th of November were you told that it was desired that you and Dr. Wilcox should be at the house at 4 o'clock in the afternoon to witness some papers?

A. Between 11 and 12.

Page 387.

Q. Were Miss Joyce and Mr. Vaughan together at the time this request was made to you?

F. 1011

A. Yes, sir.

Q. Can you recall which of the two made the request?

A. No sir.

Q. Was nothing said which informed you of the nature of the paper?

A. No sir; only an important paper.

Q. An important paper?

A. Yes.

Q. Did you say that you would attend at 4 o'clock or that you would not?

F. 1012

A. I said that I would be there at 4 o'clock.

Q. To witness this important paper?

A. Yes.

Q. Was the statement in reference to Dr. Wilcox that it was desired that he should be there also to witness to witness an important paper?

A. No sir; to witness a paper.

Q. A paper?

A. Yes sir.

Q. But was more than one paper referred to?

A. No sir.

Q. You testified to a conversation with Mr. Vaughan, in which I understood you to say that you told Mr. Vaughan something about having such a paper or some paper executed that day or at once. Do you recall that?

A. Yes.

Page 388.

Q. And didn't you say it had better be executed to-day?

F. 1013

A. No, at once not to-day. I said now at once—I may have said it.

Page 389.

Q. Did he tell you what paper it was?

A. No sir.

Q. He did not tell you whether it was a will or a codicil or what it was?

A. He did not.

Q. Simply that Mr. Fayerweather was to execute a paper which he understood to be an important paper?

Page 390.

Q. Now tell me what Mr. Vaughan said to you when he came in.

F. 1014

A. Well, I related, as I said before, Mr. Fayerweather's condition, and then he said there was an important paper, or rather a document or paper to be signed.

By Mr. Coudert;

Q. Let me go back. You told him Mr. Fayer-

weather's condition. How came you to tell him Mr. Fayerweather's condition?

A. Well, it was—

Q. Why did you broach the subject of Mr. Fayerweather's condition—what business was it of his?

A. It was in reference to this paper.

By the Surrogate:

Q. And then the arrangement was made for you to come at 4 o'clock to sign it—is that right?

A. Yes.

F. 1015

Page 391–392

Q. And did you tell him why it should be done at once?

A. Yes, sir.

Q. Did they talk of two papers that were to be executed?

A. No, sir.

Mr. Coudert: Well, Mr. Parsons says oh, no, but how did you connect Mr. Vaughan with this conversation with Miss Joyce, Doctor?

A. Because Miss Joyce called Mr. Vaughan in after I had the conversation with her in relation to Mr. Fayerweather.

F. 1016

Q. What did she call him in for?

A. To give him the information that I had given to her.

Q. About what?

A. About Mr. Fayerweather.

Q. With reference to a paper, wasn't it?

A. No, I think in relation to his condition—Mr. Fayerweather's condition.

Page 393

xxx Q. What did she say to Mr. Vaughan when he came in? Now, tell us all that she said—tell us that doctor.

A. She related to Mr. Vaughan what I had already told her.

Page 395-396.

Q. She said if this paper was to be executed, or something of that kind. What about it?

A. I said that it must be done at once.

Q. What is that?

A. I said that if it was to be executed it should be done at once.

F. 1017

Q. She said when Vaughan came in, if that paper is to be executed it must be executed at once, is that it?

A. Yes.

She said that as coming from you?

A. Yes.

Q. And there were other things stated which you don't feel at liberty to reveal because of the violation of professional confidence?

A. Yes.

F. 1018

Page 398.

Q. And nothing that Mr. Vaughan told you led you to believe that it was a codicil or a will?

A. No, sir.

Q. And when you said that it must be executed at once, you were under this impression?

A. I was.

Q. Well, were you under the impression that it was merely a formal paper of an elaborate and difficult paper?

A. No, I thought it was something simple.

Q. Merely something simple.

A. Yes.

Q. And it could be done without troubling a sick man?

A. I don't know. The idea was that it was not connected with the will or a codicil.

Q. You supposed that all these preparations had been made?

A. I thought it was all finished.

Q. When was four o'clock fixed as the time for the execution of that paper?

A. At that time, between eleven and twelve o'clock.

F. 1019

Q. At that same interview?

A. Yes.

Q. And what did Mr. Vaughan do; did he go away immediately after you said this?

A. Yes; in a very great hurry.

Q. In a great hurry?

A. Yes.

Q. And you didn't see him after that again until the breath had passed out of Mr. Fayerweather's body?

A. At the time Mr. Fayerweather died.

Q. Well, you told them this should be executed at once, and then four o'clock was fixed? Is that so?

F. 1020

A. He told me to be there at four o'clock.

Q. Well, was any reason assigned why this paper should not be executed as you advised at once?

A. No.

Q. If you will observe, doctor that there was an interval of four hours?

A. Yes sir.

Q. And it was conceded that Mr. Fayerweather was very ill?

A. Yes sir.

Q. And you, his medical adviser, said this should be done at once, and then you fixed four o'clock—I want to know—

Witness (interrupting) I did not fix four o'clock. Mr. Vaughan fixed it.

Q. Who fixed four o'clock?

A. Miss Joyce or Mr. Vaughan, I am not positive.

Q. Either or both; anyway, four o'clock was fixed. Was any reason assigned by either of them for putting it off so long?

F. 1021

A. No sir.

Q. And you accepted what they said about that; you didn't say anything further on the subject?

A. I merely said yes.

Q. That you would be there at four o'clock?

A. Yes.

Q. And Mr. Vaughan left in great haste?

A. No, I didn't say I would be there at four o'clock. I merely said yes.

Pages 399–400

Q. When you said to Mr. Coudert you understood it to be a simple paper, upon what did you base your understanding?

F. 1022

A. For the reason that I thought the codicils and the wills were finished, and it was something that related to his store or to the business of the firm.

Q. Was anything said by anybody as describing the papers, except what you have already stated?

A. No, sir.

Pages 422

Q. Is it or is it not a characteristic of a person, man or woman, in the last stages of consumption that a man or a woman will acquiesce in almost anything that is asked?

A. Well, a dying man. I say, a dying man, oftentimes will acquiesce in almost everything.

Q. In his distress and in his clinging to life he will say yes to almost everything, won't he?

A. I think so, yes, sir.

F. 1023

Page 427.

Mr. Coudert: I will endeavor to conform to your Honor's suggestion by calling your attention, again, doctor, to the conversation of Mr. Vaughan that took place in Mr. Fayerweather's house on the 15th of day of November, 1890. Did you state to Mr. Vaughan, that Mr. Fayerweather was a dying man and that he ought not be called upon to sign any kind of complicated paper?

The Surrogate: You may answer that question.

A. Not just in those words.

Q. Well, answer the question fairly and substantially.

A. I don't know what the words were.

F. 1024

The Surrogate: I understand the answer to be that he did in substance state that to him.

Page 428.

A. Yes, that is right, sir. I did in substance.

The Surrogate: That is the answer. "I did in substance."

Page 447.

Q. Now, doctor, will you describe his condition on the 11th day of November, 1890, when you acted as a testamentary witness?

A. He was at that time very much weakened by his disease. His mental capacity corresponded and was impaired to a degree. He had difficulty in signing a paper; his eyesight was bad. In writing his name he left out two letters of his name "e" and "r." Afterwards the lawyer called his attention to that fact, and he filled it in. It might, however, have been due to a fountain pen that he had, they sometimes fail to write. He did notice that he had left out those letters in his name "e," "r," and he was at that time capable of reasoning. He expressed something to the lawyer in relation to the codicil, about these different institutions as he understood the codicil, if you may remember at that time, and he did it with a great deal of weakness, that is both mental and physical.

F. 1025

A. Well, you were of opinion that on that day he was able to understand this paper and sign it intelligently?

A. Yes, to call him just about competent.

Q. Did he or not continue to fail after that?

A. Yes, sir; from day to day.

Q. Was or was not the failure of his mental and physical powers manifest to you?

A. They were.

Q. And this continued until the last moment?

F. 1026

A. Yes, sir.

Q. Now, doctor, was Mr. Fayerweather at the time that you have stated competent to sign any important paper?

A. I saw him between 11 and 12 on the 15th. I also saw him about seven o'clock in the evening and I again saw him at about the time of his death, at 11 o'clock or a little earlier, and he was not capable of signing an important paper, at either time I visited him. My visits were short, being not very long, with the exception of the last one when he died.

Q. When I say signing, I mean executing intelligently?

F. 1027

A. So I understood you; yes, sir.

Q. How long was he a dying man before the breath left his body?

A. From the time I visited him in the morning he was dying, between 11 and 12 o'clock.

Q. He was then a dying man?

A. I so considered him.

Page 449.

Q. Now I am going to ask you a proper question, doctor, will you explain what you mean when you say a man is a dying man?

F. 1028

A. When I came into the room I judged from his respiration, which was very rapid, from his pulse, from his general condition, that his feet were cold and that capillary veins had stopped circulation, the larger blood vessels were doing the work—I found that he had not taken any food, that his digestion had stopped and that the other secretions from his body had too, that he was wasting—and a man does not die all at one time, of course. He dies slowly. And in the evening when I came, towards the last, his heart ceased and finally his respiration.

Q. When you called there in the forenoon and found him in that condition, did you address him. When in the forenoon you called upon Mr. Fayerweather did you have any conversation with him?

A. I asked him a few questions and I found that he could not answer.

Q. As I understand you, before that he did not speak when you visited him in the morning?

A. No, sir, he did not; only in answer to a question that was asked him, he signified his answer by nodding his head.

F. 1029

Q. Let me ask you this, take a man in a dying condition, is it or is it not natural for him to acquiesce in everything that is asked him?

A. That has been my experience.

Q. To acquiesce, to nod yes or no to almost everything that is asked of him?

A. Yes.

Q. By yes or no, or by a nod?

A. Yes, sir.

Q. To acquiesce the best way that he can?

A. Yes.

F. 1030

Q. When you found in the morning that your patient could not answer you and did not speak, to whom, if anyone, did you address your inquiries as to his condition?

A. To Miss Joyce, Miss Amelia Joyce.

Q. She was an inmate of the family and an attendant upon him, was she not?

A. Yes, sir.

Q. Do you remember whether you used the word cruelty or not in your conversation to Mr. Vaughan?

A. I said I thought it was cruel to ask a man in his condition to sign a paper.

Q. You have spoken of his eyesight being bad, how long had it been bad, doctor?

A. Well, I should think less than two years.

Q. Was he able to read within a few days of his death—well, say within a week or two—even with the aid of glasses?

F. 1031

A. Well, at times he had great difficulty, he had to use a magnifying glass.

Page 451

Q. Who gave him that magnifyer?

A. I did. I believe I gave it to him.

Q. Did you on Thursday last say anything about telling Mr. Vaughan that it was cruel to make a man in that condition sign an important document?

A. I did not say so the other day that I remember.

Q. That is just what I wish to show, that in important respects your testimony differs from that of the other day?

F. 1032

A. I thought I was restricted from answering or else I should have answered.

Q. Is it your idea that there was any restriction upon what you testified to?

A. I did, in so far as it related to Mr. Vaughan. I thought that it related to him.

Q. You thought that you ought to say that if an important paper were to be executed at once—that day, because it did not relate to Mr. Fayerweather—that you ought to withhold that you told Mr. Vaughan that it

was cruel because that it related to Mr. Fayerweather—is that what it comes to?

A. Well, I only thought I was restricted from stating that. I would have stated that if the question were asked me.

Page 452.

Q. Who had charge of the case so far as concerns its bearings upon Mr. Fayerweather as to whether he should or should not do things that were cruel in the condition of his health?

F. 1033

A. Well, I expressed myself to Mr. Vaughan that I thought it was cruel to ask a man in that condition to sign a document.

Page 457.

Q. Up to the time that you spoke about having the paper executed to-day, or executed at once, it was Mr. Vaughan's idea so far as he communicated it to you, was it not, that it should be executed on Monday?

A. Yes, sir; he told me he wanted to know if it could not wait until Monday.

xxx Q. I want to know what the fact is; didn't Mr. Vaughan say Monday?

F. 1034

A. Yes.

Q. And you said on Saturday?

A. I didn't say Saturday. I said "now", "at once", "now."

Exhibit 89.

EXTRACTS FROM DR. REYNOLDS WILCOX'S SURROGATE TESTIMONY.

(Referring to the burned codicil of Nov. 11th, 1890.)

F. 1035

Page 412.

xxx A. "She came into the room and in our presence Mr. Fayerweather signed the codicil and we made the signatures in the presence of each other just previous to the lawyer reading the declaration.

Q. Did you hear any conversation with Mr. Fayerweather and the lawyer?

A. I did.

Q. Will you state what that was?

F. 1036

A. The conversation, the lawyer was reading this paper and Mr. Fayerweather interrupted him. The lawyer made a reply which I did not hear distinctly and then Mr. Fayerweather said, as I understand it, "everything is to be paid up, settled, the institutions to be paid their money, and what is left is to be divided."

Q. Do you know what became of the paper?

A. That paper was taken away by the lawyer.

Q. And you have never seen it since?

A. No, sir.

Q. Dr. Wilcox, were you ever at the house subsequent to that day?

A. I was not.

Q. Were you ever notified to be there at any time or call there?

A. I was notified by Dr Vedder to be present at Mr. Fayerweather's house at 4 o'clook on the 15th.

Q. At what time did you receive that notice?

A. Between 12 and 1 o'clock of the same day, the 15th.

F. 1037

Q. Do you know how Dr. Vedder received that notice of request to inform you?

A. He received that notice or request at Mr. Fayerweather's house at a few minutes before I o'clock or between 12 and 1 o'clock that day.

Page 414.

Q. Did you and Dr. Vedder go to Mr. Fayerweather's house on that day?

A. We did not.

Q. Why didn't you go?

F. 1038

A. Because when we came into the office together between the hours of 3 and 4 that day, Dr. Vedder received a note saying that it was not necessary for us to go.

Q. And he communicated that to you?

A. He did.

Page 416

Q. Going back to the time of the execution of this paper of the 11th, do you remember whether Mr. Fayerweather made use of the words "In proportion or pro rata or share in speaking of the institutions?

A. He used the word "share" and not the words "pro rata or proportion."

Q. Will you then state as nearly as you can remember just how, in what connection he used that word share?

A. The word share referred to the division of the balance of the estate after all claims had been settled.

Page 417

Q. Was there anything that you remember that prevented on your part your going to Mr. Fayerweather's house on the 15th?

F. 1039

A. No, sir.

Q. The reason you did'nt go there was because you received notice not to go?

A. Yes.

Page 118

By Mr. Parsons:

Q. In the testimony which you have given about Mr. Fayerweather's statements, had the occurrence of November 11th, do you mean to be very positive in your recollection or are you doing the best that you can?

F. 1040

A. I am doing the best that I can, Mr. Parsons.

Q. Well, is it possible that—is it possible for you after this interval and in respect to an occurrence of that kind to testify with any accuracy as to the language used on the 11th—as to the language you observed?

A. It is impossible for me to give the exact words, Mr. Parsons.

Exhibit 90.

EXTRACTS FROM EDWARD M. GROUT'S SURROGATE TESTIMONY.

F. 1041

Page 501

xxx A. When I reached the point where the codicil refers to the tenth clause, I think that is the number, in the original will, I discontinued reading the codicil and opened the will at that clause and there read that clause through, or read the substance of it to Mr. Fayerweather, Mr. Fayerweather interrupting me by saying, "Yes, yes, I know," or something of that sort. When I reached the place in the codicil where the sentence occurs "In witness whereof, I have hereunto set my hand and seal," Mr. Fayerweather raised himself from his pillows, drew his feet out beside the bed, and was seated on the side of the bed just as I am seated in this chair, except that his feet did not reach the floor.

F. 1042

Q. Did you assist him in any way to take that position?

A. Not in the least, I did not touch Mr. Fayerweather with my hand at any time. I don't think I ever even shook hands with him.

Q. Will you please repeat what it was that Mr. Fayerweather said when you reached the tenth clause paragraph of the will?

Mr. Rollins: He has not said anything of the kind.

Mr. Arnoux: Yes, the witness said that he said something.

Q. Give the substance of it?

A. To the best of my recollection, Mr. Fayerweather, when interrupting my reading said the words, "yes, yes, I know," or something to that effect, indicating his knowledge of what I was attempting to explain to him.

F. 1043

Mr. Rollins: Please don't draw your inferences.

Page 502

Q. Now, did you in any way guide his hands?

A. I did not.

Q. Did you suggest to him where he should put his hand to sign?

A. I don't recollect whether I pointed at the place opposite the seal or not, but I should probably do so.

Q. Did he of his own motion put his hand down to the place where he should sign?

A. He did.

Q. Now go on?

F. 1044

A. Mr. Fayerweather while writing, or in the midst of his writing, made some sign, or used some word—I don't distinctly recollect which indicating that.

Mr. Rollins: State what he said.

(Continuing) I don't remember what he said, except it was "pshaw" and in connection with what he said afterwards, I drew a certain inference from that.

Q. He said "pshaw," or something of that character?

A. Yes.

Q. An ejaculation?

A. Yes.

By the Surrogate:

Q. What was he doing?

A. While writing—while writing his name. Upon finishing writing his name he complained about the poorness of his signature.

F. 1045

By Mr. Arnoux:

Q. What were his words?

A. His words: "That's not a very good signature." I told him it was good enough, that if only it was his mark, that was sufficient. I asked him the statutory questions in regard to acknowledging the publication of the will. I asked him if that was a codicil to his will, and if he signed, sealed and declared it, and if he wished Mr. Browning and Miss Joyce and myself to act as witnesses, and to all this he replied in the affirmative.

F. 1046

Q. Do you remember whether he replied by words or simply by a nod?

A. I do not.

Q. Did his feet still hang over the bedside when he returned, did he draw his feet in there?

A. He drew them in just as he had put them out before.

Page 505.

Q. Who was it that responded when you asked the question whether everything was ready?

A. My recollection is that I addressed the question to Mrs. Fayerweather, and that Mr. Vaughan and Mrs. Fayerweather both responded in the affirmative.

Page 507.

xxx Q. Now, you say that upon your arrival, or soon after your arrival, you said, "Is everything now ready?" or some such expression. Correct me if that is not right?

A. I don't think I used the word "now". I asked if everything was ready.

Q. That is, putting it in the interrogate form you said, "is everything ready?"

A. Yes, I may have used Mr. Fayerweather's name and asked whether he was ready.

F. 1047

Q. Did you? I don't remember either one or the other.

Page 511

Q. Did General Woodford call your attention to the fact that while at the special instance of the testator himself he had excluded Mr. Vaughan by the first codicil to his will from any share in the residue, he had on Mr. Vaughan's representations only now included him, and that there was a particular reason for your calling that matter to the attention of the testator?

A. No, I never heard that until now.

F. 1048

Page 512.

Q. Did he tell you that he had heard that Mr. Fayerweather was, to use his words, "A very, very sick man?"

A. He simply told me he was a sick man and that it was necessary for me to go to his house.

Page 517.

xxx A. He did not make any efforts. He raised him-

self from a reclining position and threw his feet out of the bed.

Page 518–519.

Q. Did he tell you that by a previous codicil the residue had been given to Mr. Bulkley and Mr. Ritch, and that he had not been included?

A. He did not. I did not know that fact until I stated the contents of that tenth clause to Mr. Fayerweather.

F. 1049

Q. How did you ascertain it then?

A. I had the original will in my hands and read from it?

Q. You did not read the will?

A. I did; I stated the contents of that tenth clause to Mr. Fayerweather.

Q. Which did you do, try and recall whether you read it or whether you explained it?

A. I started, as I remember, to read it. On Mr. Fayerweather interrupting and stating that he knew it, I discontinued reading and simply stated in brief the effect of the balance of it. Mr. Fayerweather interrupted me by saying, "Yes, yes, I know."

F. 1050

Q. Impatiently?

A. As it was unnecessary for me to go on— "Yes, yes, I know"

Q. Did you read, or if you did not read, what did you do by way of explanation, say to him before he interrupted you, that Bulkley and Ritch were the residuary legatees and they only?

A. I knew nothing of Mr. Bulkley and Mr. Ritch being residuary legatees except by the fourth codicil, the tenth clause of the will gives it to them as executors in trust to divide, as I recall it.

Q. Then what you read Mr. Fayerweather was not the first codicil; you did not read anything of that?

A. No, sir.

Q. Only from the original will?

A. That is all that is referred to in the fourth codicil.

Q. The original will says nothing about giving the residue to anybody, any individual trustee?

A. Yes, it gives it to Mr. Ritch and Mr. Bulkley as trustees.

Q. For the benefit of all the Colleges that are
F. 1051 named in the ninth article?

A. It does not say anything about colleges. It refers to the persons and corporations mentioned in the previous clause. I know nothing as to whether they were colleges and hospitals. I did not read the rest of the will.

Q. They are colleges, but I will not put it in your way. It does give the residue in trust to these two executors for the benefit of the institutions named in the previous clause.

A. I think that is the language, but I did not know of these institutions.

Q. Had you heard that to-day there was in
F. 1052 existence a codicil to that paper which undertook to give the residuary estate to Mr. Bulkley and Mr. Ritch individually?

A. I knew there were codicils in which—I had them in my hand, but I didn't know the contents of them.

Q. Who gave you the codicils that day?

A. Mr. Vaughan gave me the fourth original instrument.

Page 523.

Q. It didn't occur to you as at all singular that Mr. Vaughan was assuming to take charge of those papers instead of leaving them in the house with Mrs. Fayerweather?

A. No.

Page 525

Q. Did you read or explain any portion of the will except the tenth article?

A. I did not. I never knew anything of the will or the rest of the codicils, except the tenth clause, until after they were brought, or until just before they were brought for probate down here, and after Mr. Fayerweather's death.

Page 526.

A. XXX. No one was in Mr. Fayerweather's room except Miss Joyce, Mr. Browning and myself and Mr. Fayerweather during the time I was there.

F. 1053 Page 529.

Q. What was it that was in your mind, Mr. Grout, as the conditions of things that might require the employment of special care?

A. Because when I saw that the residuary estate was given to these three gentlemen, I did not know anything about the circumstances. I did not know anything except the bare fact, and seeing the bare fact and knowing nothing of the other papers I thought it my duty to be as careful in the execution of that instrument as I could possibly be, and to know positively that the paper was executed in the manner as the statute required that they should be executed by a man able to execute it.

F. 1054 Page 530.

A. XXX. When I saw the fact that this bequest as it stood, knowing nothing of the will or the other codicils, the simple fact that the residuary estate was given to these three gentlemen, I thought it was my duty to be extremely careful to see that all of the statutory requirements were carefully fulfilled and that Mr. Fayerweather, who was to execute it, knew what he was executing.

Q. Well, Mr. Vaughan didn't seem to agree with you?

A. Mr. Vaughan didn't.

Q. And evidently General Woodford didn't?

A. That was simply my idea from seeing the paper and knowing nothing further.

Q. Mr. Vaughan did not take that opportunity of telling you as he had told General Woodford that Mr. Fayerweather was very, very sick?

A. He did not.

Q. He did not tell you that the physician had advised him that if the paper was not executed pretty soon it could not be executed at all?

A. He did not. I have given you the whole conversation.

F. 1055 Page 532.

Q. Didn't you think it important to call Mr. Fayerweather's attention, not simply to the residuary clause, but to all the various provisions of these various papers?

A. I did not; I only thought it necessary to call his attention to the provision which by the codicil was altered, assuming that the man would know the rest himself.

Page 533.

Q. You did not know, Mr. Grout, that except from his saying "Yes, yes; I know," when you were there reading or calling his attention to the tenth article of the will, you did not know that Mr. Fayerweather had ever seen the inside of any one of those papers?

F. 1056 A. I think I did; yes, sir.

Q. How?

A. From the fact that that paper which I was reading recited certain instruments, and that Mr. Fayerweather, by his silence assented to them he must have known.

Page 534—535.

xxx A. I understand that Mr. Fayerweather had made a will, that he had successively made three codicils, and I should suppose that those codicils made some alteration—I understood this that the codicil recited the tenth clause of the will and altered that tenth clause.

Q. Did you understand, Mr. Grout, (pay close attention to my questions) did you understand that except as it might be modified by the execution of this fourth codicil that that tenth clause of the will stood as the will of the testator?

A. I did not. I understood that the will and the codicils were taken together as one instrument, as I understand they are, stood and were ratified, except with the modification made in this tenth clause.

Q. Did you understand what modification any previous codicil had made in the tenth article of the will?

F. 1057 A. I did not. I have told you I did not know what the codicils contained.

Q. Now read, sir, from the fourth codicil what you say was the modification of this will—of the tenth article of this will, anything that modifies the tenth article of the will?

A. Yes, sir, I will do so with pleasure, if you will kindly hand me the fourth codicil. The one that you have just given me is the first codicil.

Q. That, I, think, is a reasonable request.

A. "Two.—I hereby confirm the revocation of the tenth paragraph of my said will. Third.—I hereby amend and change the third paragraph of the codicil dated and made December 13th, 1884, so as to read

F. 1058 as follows:" And then follows the residuary clause.

Q. Now, why didn't you read the third paragraph of the codicil dated and made December 13th, 1884?

A. I did not regard it as necessary. It is contained in here with the alteration.

Q. In where?

A. In here with the alteration, "I hereby amend and change the third paragraph of the codicil dated and made December 13, 1884 so as to read as follows:" And then follows the paragraph with the alterations.

Q. But how did you know that the testator knew

what the third paragraph of the codicil dated and made December 13, 1884, was before it was changed?

A. Just in the same way as I know what any man understands of my conversation when I am talking to him.

Q. That is what you call special care, is it?

A. I do. I read the paragraph which was revoked by the codicil and then read the amended paragraph.

Q. What?

A. I read the paragraph of the will which was the ratification, and then I read the paragraph as

F. 1059 amended.

Q. Mr. Grout, you did not know that the change was expected in the third paragraph of the codicil brought in by Mr. Vaughan to certain privileges which he would not have enjoyed if the previous papers had gone to probate without that codicil?

A. I knew nothing of the effect of the third codicil.

Q. But I am talking about the fourth codicil?

A. I did not know that he was referred to—Mr. Vaughan, or anyone else. I knew it was amended "so as to read as follows." I did not know what its prior form was.

F. 1060 Page 536.

Q. You did not know?

A. I did not know at that time.

Q. Now, tell me why you thought it important to read the tenth article to the will which simply confirmed a revocation, and did not read the third paragraph of the codicil wherein the revocation was contained?

A. Because I thought that Mr. Fayerweather should have his special attention called to what was revoked, and as to what stood in the third paragraph—it was contained here with the alteration, and that there was a complete paragraph as amended. I may have been wrong and you may go on and criticise me if you choose, but there is the fact.

Q. Don't you see, Mr. Grout, that you were wrong?

A. I think I was perfectly right.

Q. Don't you see that that paragraph in the will which you read to him, or which you undertook to explain to him, had already been killed dead?

A. Certainly.

Q. By a codicil?

A. It says: "I hereby confirm the revocation."

Q. And that the sensible and proper thing for you to have done if you really had been taking special care was to show Mr. Fayerweather how his will would stand without the modification of the fourth codicil, and how the modification of the fourth codicil affected it?

F. 1061 A. No, I don't.

Q. You don't know?

A. I don't think Mr. Fayerweather was a man—not the kind of man I would care to bother to offer any advice to—to obtrude any advice.

Q. That you think would have been an obtrusion?

A. I think so; he manifested impatience when I was reading the tenth clause of the will.

Q. And did you understand that the reason you did not read the third paragraph of the codicil was the cause of Mr. Fayerweather's impatience?

A. I didn't say so.

F. 1062 Q. Do you mean to imply that?

A. I do not. I simply told you what I thought would have been the effect if I had obtruded anything in the nature of advice upon him.

Q. There was nothing said, was there, by Mr. Fayerweather in your presence or hearing to indicate at all that he knew what change was effected in the third paragraph of the codicil of December, 13, 1884, by the fourth codicil?

A. Oh, yes, sir; he declared that to be a codicil to his will.

Q. Well, anything else than that?

A. He rose to sign it?

Q. Was there anything else except the fact of his executing it?

A. He declared and published it as a codicil to his will.

Q. Anything else? A. Nothing more, no, sir.

Q. Was there anything that showed you that he had the faintest idea what was the contents of the third paragraph of the codicil of December 13, 1884, except what you have just said when he executed this other paper?

A. He did not say anything, but I could see that he knew well enough what he was doing—that
F. 1063 he was in a condition of mind to know what he was about.

Q. I presume that you are able to give us a pretty good imitation of the way a man looks when he knows that he has given his residuary estate to Justus L. Bulkley and Thomas G. Ritch?

A. I should think, if you will allow me, it is not merely by the look that is on his face—not merely how a man looks that you ascertain whether he knows what he is doing, but by his general manner and conduct.

Q. Did he say that he was giving his residuary estate to Justus L. Bulkley and Thomas G. Ritch?

A. I don't know that he used those words.

Q. Did he say that he knew?

F. 1064 A. He did not use those words which you have used.

Q. But he looked it?

A. He looked it; he looked intelligently.

Page 538

Q. Do you think that is a good, fair average specimen of Mr. Fayerweather's handwriting—that is, his signature?

A. It bears the characteristic attributes of Mr. Fayerweather's signature. It is not as good a signature as Mr. Fayerweather habitually made, I think. At least Mr. Fayerweather told me so in fact.

Page 542

Q. This paper which was, "I hereby confirm the

revocation of the tenth paragraph of my said will"—all you undertook to read was the tenth paragraph of my said will?

A. That is what I have said, the tenth paragraph and this fourth codicil.

Q. And you did not undertake to read anything, which contained the revocation of that tenth paragraph, which revocation was to be affirmed by this paper?

A. No.

Mr. Rollins: Well, that is clear enough?

Page 545

xxx. My object was to show that neither Mr. F. 1065 Grout nor this testator knew at the time of the execution of this codicil what its operation was upon the third codicil. Mr. Grout has frankly confessed that he did not know—he has testified here to-day, as I claim, and I say that they may show that the testator, and that is a burden that they are bound to carry in this case, and that the evidence does not yet show that he knew what the operation of the fourth codicil was upon the third. That was the idea of my examination, and for that reason I would not object to its being answered.

Exhibit 91.

EXTRACTS FROM EX-JUDGE ROLLINS' REMARKS AT THE SURROGATE'S PROCEEDINGS.

F. 1066 Page 620-621.

Now, what we want, your Honor, is not Mr. Parsons' promises, but we want evidence. We saw that if this gift is to be upheld, is to be insisted upon by these beneficiaries of the residue as a gift to them to spend for their own purposes, for whatever they like, it is a fraud. We expect to establish to your Honor's satisfaction that the testator did not intend to deprive his widow and his next of kin of this estate to enrich these men. We say that be not the case, we expect to show that there is a secret trust whereby these three millions of dollars, although in form given to these men absolutely, is to be used by them for purposes which, if written

on the face of the will would make the will ineffectual and illegal. We do not ask your Honor to declare that trust. Your Honor will observe that neither Mr. Coudert nor myself have asked your Honor to construe this will.

The Surrogate: What becomes of the charge of undue influence if you are going to prove that?

F. 1067

Mr. Rollins: It falls—then the charge of undue influence falls. What I say is this: We are groping here in the dark so far as I now can see, except Mr. Parsons' promises which await fulfillment; so far as we now see we are justified in charging that this will was obtained by undue influence. They may say that it was not undue influence; that the property was given to them to make some disposition of, other than for their own purposes. What we say now is—was it? That is our position, your Honor. If they do show it to your Honor's satisfaction they may show it to ours; for aught I know they may show it to your Honor's satisfactions whether they show it to ours or not. But they must show it. The burden now is upon them, and they have not relieved themselves from it. If they do show it, if we have any remedy, it is in a Court of equity—in a Court of general equity jurisdiction.

F. 1068

We want to find whether the things that Mr. Parsons says are true. He thinks they are true no doubt. We want to find if they are true, and if they are true we want that these men have had this intention all the time that they have received the gift with the understanding that it was impressed with the trust; if that be the fact we want to find it out. We want to find from Mr. Ritch what he thinks about it, from Mr. Vaughan what he thinks about it. Mr. Vaughan must tell us, we submit, under the rules of the law that are applicable to proceedings of this kind, before the proponents close he must

tell us about that codicil that was executed on the 11th day of November, and that seems to have mysteriously disappeared. He must tell us what passed between him and Mr. Fayerweather; what authority he had to go down to General Woodford's office on that day and get that codicil drawn.

F. 1069

Exhibit 92

EXTRACTS FROM HENRY B. VAUGHAN'S SURROGATE TESTIMONY.

Page 633

Q. And is it a fact that until the moment of his death he consulted you about his affairs?

A. Yes; I think I regarded him as my best friend and I think he had the same opinion of me.

Q. Well, then, when did he cease?

F. 1070

A. There was one time during the day that he requested me to leave the room.

Q. On the day of his death he asked you to leave the room?

A. Yes.

Page 634

Q. At what time did he request you to leave the room?

A. I cannot remember the hour?

Q. Was it in the morning or in the afternoon?

A. I think it was in the evening.

Q. In the evening?

A. Yes.

Page 637

xxx A. He left or intended to leave the bulk of his estate to institutions, but I don't know that you can limit it to educational institutions.

Page 642

A. I cannot remember exactly, but I remember this, that upon reading that I suggested that I should be allowed to see Mr. Ritch, and to know why that form of will was adopted.

Q. That you can remember?

A. Yes.

F. 1071 Page 643

Q. And you understood that he gave his full residuary estate to these two men, didn't you?

A. As an absolute gift; yes, sir.

Q. As an absolute gift, and that is what you wanted to see Mr. Ritch about?

A. Yes, sir.

Q. Couldn't Mr. Fayerweather explain it?

A. He didn't?

A. No, sir.

644

Q. And what explanation did he attempt to give?

A. He said he believed his wishes would be carried

F. 1072 out.

Q. And all you can remember now is that he gave you an explanation that didn't satisfy you?

A. That is as far as I got.

Q. And you asked for nothing more?

A. Yes, I did. Then I suggested that I should be allowed to go and see another lawyer.

Q. And what did he say about you going to see Mr. Ritch?

A. He didn't wish me to go.

Q. What?

A. He preferred me to go and see another lawyer.

Q. About what?

A. About that clause.

646

Q. Well, couldn't he; isn't it a fact that his eyesight had given out?

A. His eyesight was bad, but he could read.

Page 648

Q. Well, what did you want an explanation about?

A. I wanted on explanation whether that would carry out what I believed to be Mr. Fayerweath-
F. 1073 er's wishes.

Q. How did you know his wishes?

A. As I had talked with him generally, and I told you before that he told me that he wished his money to go to institutions.

650

Q. And you wanted to know from the lawyer whom you were to consult whether giving this absolutely to those two men was a legal way of giving it to institutions. Was that it?

A. About that.

Page 654.

Q. I know that he can take care of himself, but
F. 1074 so far as you are concerned, have you any objection.

A. I don't wish to have any control over Mr. Butler.

xxx A. No, I have not.

Q. Do you remember saying to her "that man Ritch is a damned scoundrel"?

A. I don't.

Page 655.

Q. You will not swear?

No. No.

Q. If you did not use those exact words didn't you use some words denunciatory to Mr. Ritch?

A. I don't remember.

Page 658.

Mr. Parsons: The last formal act of Mr. Fayerweather's life was an expression of his opinion of Mr. Ritch, and that was done by the codicil of the 15th of November.

The Surrogate: Yes.

Page 659.

Q. Well, what do you mean by that—that you may. Did you entertain one?

A. Yes.

F. 1075 Q. What was it?

A. I wanted an explanation of something that he had done, and until I got it—

Q. And you delivered both of these letters to Mr. Ritch?

A. I delivered the second letter the next day.

By Mr. Coudert:

Q. Why didn't you deliver it the same day?

A. I wanted to get first the original will and codicils.

Q. He said he would send them and you insisted upon taking them, didn't you?

A. I didn't insist, but I called his attention to

F. 1076 the fact that the letter written asked that they be given to Henry B. Vaughan. I would not have insisted.

Q. Did he show any feeling on the subject?

A. Angry, do you mean?

Page 661.

Q. Any kind of feeling?

A. Some surprise.

Q. Is that all?

A. That is all, I believe.

Q. And did he turn white?

A. I think he did. I don't remember.

Q. Now that you are refreshed, Mr. Vaughan, by

that glass of water, did you state to any one, and if so, to whom, that when you handed that letter to Mr. Ritch and demanded the papers he turned white as the paper itself?

A. I think that I wrote a letter to either Mr. Fayerweather or Miss Joyce, and there was something like that in it, but what I said in the letter, I don't know.

Q. It was true if you wrote it, of course, wasn't it?

A. Well, I believed it was true when I wrote the letter.

Q. You believed it was true?

A. Yes.

F. 1077 Q. What did you mean by writing Mr. Fayerweather or Miss Joyce that Mr. Ritch turned white as a piece of paper?

A. Well, I guess I meant that he turned, in my opinion, white as a piece of paper.

Page 664.

Q. What was the object for which you had this codicil made—was it to correct any defect in the other papers?

A. Well, it was to change the other papers?

Q. It was to change the other papers?

A. Yes.

Q. And your object in going at Mr. Fayerweather's request to Mr. Butler was to have that residuary

F. 1078 clause changed, was that it?

A. Well, originally, it was. The idea of changing it came in my interview with Mr. Butler.

Q. He remedied the defect which you or Mr. Fayerweather apprehended to exist?

A. Which I apprehended to exist.

Page 665

Q. Then Mr. Butler suggested the new codicil to correct the difficulty that existed?

A. I don't know. It came out—the new codicil came out, but whether Mr. Butler suggested, or I, of course I do not now remember.

Q. Well, one of you did?

A. One of us did.

Q. As a remedy for the defect?

A. Yes.

Q. And the memorandum you carried to him did you read it or Mr. Fayerweather?

A. I presume I did; yes, sir.

Page 669

Q. Now do you mean to tell me that you cannot tell me a word about that?

A. Well, I can tell you a word about it.

Q. Well then tell me that word?

F. 1079 A. It was a codicil to the will and changed the will or changed a part, but how it changed it, the wording of the will I cannot remember.

Q. I don't ask you for the wording. Tell me how it changed it?

A. Well, it changed it. It took the residuary legacy away from Mr. Bulkley and Mr. Ritch.

Q. Yes, and what did it do with it?

A. I think it gave it according to the tenth paragraph of the will. I think that was it.

Q. That is to say it restored the tenth paragraph of the will?

A. I think that was the substance of it.

Q. Now, Mr. Vaughan, what became of that pa-

F. 1080 per?

A. It was destroyed by Miss Amelia Joyce.

Q. At the moment I am speaking of Miss Joyce was present—who suggested the destruction of the paper?

A. I guess I did.

Q. You did?

A. I believe I did.

Q. Is this the fact—is it the fact that you asked Mr. Fayerweather, holding the paper in your hand, if it was his wish to have this paper destroyed by you, and he nodded his head?

A. No, I think I asked him to tell Miss Joyce to destroy the paper.

Q. Well, how did he ask her? Did he say yes?

A. I don't remember whether he said yes or not.

Q. And why did you ask Miss Joyce to destroy it, why didn't yon do it?

A. Well, as he asked me I thought he had better have two, better than one.

Q. You say you thought you had better have two than one—what do you mean?

A. So that there would be a witness to its destruction.

F. 1081 Page 672

Q. Was Miss Joyce able to see it or did she see it?

A. I should judge not.

Q. Therefore she never knew what she was destroying?

A. Well, I think she heard me tell Mr. Fayerweather what it was in her presence. I think so.

Q. And then all that Mr. Fayerweather knew about it was what you said in her presence?

A. Yes.

Q. And to this day she has no personal knowledge of what was in that envelope, has she?

A. I don't know that she has.

F. 1082 Q. Well, she couldn't have, could she?

A. I don't think she could.

Q. Now, besides changing the tenth clause, the residuary clause, was there anything else in that codicil?

A. Not that I remember.

Q. No legacies to any one?

A. Not that I remember.

Page 675.

xxx A. I remember Mr. Ritch writing a letter to Miss Joyce, but I don't remember the other things that you say.

Q. She showed you that letter, didn't she?

A. I think, if I remember correctly, she wanted Mr. Fayerweather to read the letter and he declined to receive it, and told her to "give it to Mr. Vaughan".

Q. She did give it to you?

A. She did.

Q. What have yon done with it?

A. I think I gave it to Mr. Parsons.

Page 676.

Q. What did he say when he refused to read it?

A. "Give it to Vaughan".

Q. Did you read it to him?

F. 1083 A. No, sir, I did not.

Q. That was the day of his death?

A. Yes, sir.

Q. When did he say that if any one wanted to see him about business to talk to you?

A. I can't give you the date. It was during that week.

Page 678-679.

Q. Did he tell you that she had come there on business?

A. He told me she came there, and said she understood she was to have $100,000 more under the will, and he said "as long as she has been here she might as well have that, don't you think so, Vaughan?

F. 1084 Q. And then you said "yes"?

A. She was there on Friday and had this conversation.

Q. Mr. Fayerweather told you this on Saturday, the day of his death?

A. Yes.

Q. What time of day?

A. Early in the day.

Page 680.

Q. Well, did you after his death, almost immediately after his death get possession of his securities, or any of them?

A. I don't know how soon it was after his death, but I think Mrs. Fayerweather gave me an order that gave me possession, or that gave me admission into the Safe Deposit Comprny.

Q. How came she to give you that order; was it her own suggestion that she should give you such an order?

A. I don't remember now how it was.

Q. Who had actual, physical possession of it?

A. Hls confidential man, Mr. Myrick.

Q. Did Mr. Myrick tell you that he had gone there and asked her to sign an authority for you?

A. I don't remember whether he did or not.

F. 1085

Page 681.

Q. Let me ask you here, Mr. Vaughan, were there any business relations between you and Mr. Fayerweather?

A. At the time of his death?

Q. Yes.

A. There was. Well, I don't know whether you would call that business relations. I owed him $500,000. That's business relations.

Page 682.

Q. When did you go there for the first time on
F. 1086 Saturday?

A. I think about ten in the morning.

Q. How long did you stay there; I mean how long did you stay in the presence of Mr. Fayerweather; not in the house, that I do not care anything about?

A. I think I was with him from the time I went there in the morning until the doctor went in, and when the doctor came I retired from the room.

Q. You stayed in the room?

A. Yes.

Q. Who else was in the room?

A. I guess we were alone at first; I think Miss Joyce was there when she gave the letter, but the balance of the time we were alone.

Q. When she gave you that letter for Mr. Ritch?
A. Yes.
Q. And you remained until the doctors came?
A. Only one doctor came.
Q. Dr. Vedder?
A. Yes.

Page 684

Q. You did not see Mr. Ritch that day, did you?
A. Yes, sir.
Q. It was general Woodford who drew the codicil, was it not?
A. Yes, sir.
F. 1087 Q. Was Mr. Ritch in the office when it was drawn?
A. Part of the time, and part of the time not.
Q. Were you acquainted with General Woodford before?
A. I knew him by sight, whether I knew him personally I don't know.
Q. Did you show him any paper or other evidence of your right to have a codicil drawn?
A. No, sir.
Q. You stated what occurred, what you wanted, and he took your word for it?
A. Yes, that was it. Mr. Woodford was requested by Mr. Ritch to draw the codicil.

F. 1088 Page 684

Q. Is that the letter that we were speaking of, that Miss Joyce handed you?
A. My impression was that the letter was dated the 14th, and I find this letter dated the 13th.
Q. I think that is pertinent, but with that exception, do you believe that that is the letter?
A. That is an important exception to me.
Q. We will look at the contents. Did you read such a letter as that?
A. I was not particularly impressed with the con-

tents, but that letter came on Saturday morning, and I saw Mr. Ritch on Friday, and this letter is dated the 13th.

Mr. Parsons: Perhaps that was a mistake.

The Witness: I don't know about that.

Page 687

Q. Mr. Ritch states in this letter of the 13th that he has had two long talks with you. Is that true?

A. I think that date is a mistake.

What do you think was the date?

F. 1089 A. I think the letter must have been written on the 14th.

Mr. Parsons: It was the Friday.

Mr. Ritch says that you stated to him that Mr. Fayerweather was too ill to be seen. Is that true?

A. I don't know.

Q. Did you tell him so?

A. I don't know.

Q. Was he too ill to be seen?

A. He was seeing me right along.

Page 688.

xxx A. I think I have told you before that I did not communicate the contents of any of that letter

F. 1090 to Mr. Fayerweather.

Page 689.

xxx A. That was an oversight. I write a good many business letters, and without thinking of it, I signed this Hall & Vaughan.

Mr. Coudert: I will now read this letter.

Hall & Vaughan,
Hides and Leather,
18 Ferry street.
New York, November 13, 1890.

Dear Miss Joyce:

Will you please explain to Mr. Fayerweather that I have obtained the letters from Mr. Ritch. At

first Mr. Ritch stated that he would take the papers to Mr. Fayerweather, but I reminded him that the letter read to give them to me, and he said he would do it. He grew, however, as white as the paper on which I am writing. I will deliver the second letter to-morrow. There is, however, but little use in this, and I am convinced from his manner that Mr. Ritch knew exactly what he was doing.

Truly yours,

Hall & Vaughan.

F. 1091 Page 690

Q. Won't you please explain just what you meant when you said of Mr. Ritch that he grew as white as the paper upon which you were writing?

A. That Saturday morning must have been a mistake, I meant Friday morning.

Q. Well, this is the 13th?

A. That is Thursday, I have made a mistake there. That was meant to be Friday.

Q. Well, I am not asking you what it was meant for. I am asking you now to explain what you meant by saying that he grew white as the paper upon

F. 1092 which you were writing?

A. I think I meant that he was as white as the paper upon which I was writing.

Q. xxx What impression did you mean to convey by that language?

A. Why, I believe I meant to convey the impression that Mr. Ritch had done something that I thought was wrong.

Page 691.

Q. Do you really mean to say that he grew as white as the sheet you were writing on because you were angry?

A. Well, I don't know what made him grow white, but he may have been angry.

Q. Well, it may have been from anger or from anything else, but what did you think it was from?

A. I should not be surprised if it was from anger.

Q. You did see him Friday?

A. I saw Mr. Ritch Friday.

Q. This "him" then is Mr. Ritch?

A. Yes.

Q. But you say I will see him Saturday morning?

A. That's a mistake. I meant to see Mr. Ritch Friday morning, not Saturday.

F. 1093 Page 692.

Q. When you said "I will deliver the second letter to-morrow", that was Friday, of course?

A. Yes.

Q. Your postscript was meant to agree with that?

A. Yes, but there is another explanation, that he may have referred to Mr. Fayerweather, and I may have intended to see Mr. Fayerweather Saturday morning.

Q. I understood it to mean Mr. Fayerweather.

Q. As a matter of fact, you did exactly that?

A. No, sir; I saw Mr. Ritch on Friday and Mr. Fayerweather on Saturday.

F. 1094 Page 694.

Q. What did you mean by saying that there was little use in delivering the second letter?

A. Well, that Mr. Ritch knew just exactly what he was doing, and there would be no contradiction in any way gained from what I had thought that that was an absolute gift to these two gentlemen.

Page 695

Q. Well, I want to ask you again what you meant when you said that Mr. Ritch knew exactly what he was doing. To what did you refer?

A. I understood that it was an absolute bequest to these gentlemen.

Page 702

Q. When you saw General Woodford, and when this codicil was drawn, that you have spoken of, did you tell him that a codicil had been drawn by another attorney, and executed three or four days before?

A. No, sir.

Q. Did you ever tell him that?

A. No, sir.

Q. You purposely concealed that, did you not?

A. I didn't tell him.

Q. And you didn't mean to tell him?

F. 1095 A. No, sir.

Page 704

Didn't you say to Miss Joyce at the time Mr. Coudert referred to in his questioning that result of this gift of the residue to Mr. Ritch and Mr. Bulkley was to give away two-thirds of the estate to them absolutely, or something to that effect?

A. I can't remember.

Q. You won't swear that you did not?

A. I did know that that clause gave away the residue of the estate absolutely; I told Mr. Fayer-

F. 1096 weather so.

Page 705.

Q. you knew that he was worth, say $5,000,000, didn't you?

A. Well, I knew he was a rich man.

Q. About that?

A. I knew pretty near how much he was worth.

Q. And you knew that that clause, if it meant what it said, would carry to Mr. Ritch and Mr. Bulkley something like two and a half millions—over two millions anyway—didn't you?

A. Pretty near that.

Q. Well, now can't you remember under those extraordinary circumstances, more definitely than you have

yet stated, what happened, what was said by you or Mr. Fayerweather?

A. I tried to get an explanation for it.

Q. Well, what did you say in your effort to get an explanation?

A. What was the use of saying anything. I wanted to get an explanation. I finally got the explanation.

Page 705.

Q. What was it you wanted explained?

A. Why those two gentlemen were heirs of Mr. Fayerweather's residuary estate.

F. 1097 Page 710.

Q. Was the destruction of the codicil, did the idea, the notion of the destruction of the codicil originate with you?

A. I cannot say whether it did or with Mr. Fayerweather.

Page 711.

Q. For aught you can remember it was quite as likely to have been you as he?

A. I had the order to destroy the codicil of the 11th before the codicil of the 15th was signed.

Q. By whom?

A. Mr. Fayerweather.

F. 1098 Q. In his room?

A. Yes.

Q. When?

A. Before the first one was signed.

Q. The last one you mean?

A. Before the last one was signed.

Q. You mean on that very same occasion?

A. That day; yes, sir.

Q. And just before, you mean?

A. No; because you remember I didn't see Mr. Fayerweather from the time Dr. Vedder told me that if I had any papers to be signed, they had better be signed

soon, until after the other codicil was signed.

Q. Well, you were at first disposed to postpone this matter until Monday, were you not?

A. Yes, sir.

Q. Why didn't you?

A. Because Dr. Vedder said I had better do it soon.

Q. That is, you thought that the testator would die?

A. Dr. Vedder said I had better do it soon.

Q. Well, he did die that same day?

A. There is no question about that.

Q. And you were in a good deal of a hurry when you went to Mr. Ritch's office that morning?

F. 1099 A. I went there to get it done soon; yes.

Q. At what hour on Friday had you seen Mr. Ritch?

A. I saw Mr. Ritch, I think, once or twice Friday

Q. Well, once or twice?

A. Well, I can't tell you just how many times. I went from Mr. Ritch's office; to Mr. Butler's office and back to Mr. Ritch's office, I spent a good deal of the day on that matter.

Page 712.

Q. Now, don't you think you can remember how many times you were at Mr. Ritch's office that day?

A. Well, Friday, whatever distrust I had of Mr. Ritch I had entirely removed.

F. 1100 Q. I ask you how many times you were there.

A. I can't tell how many times I went back and forward between the two lawyers' offices.

Q. Mr. Vaughan, when you saw Mr. Ritch on the 13th——

A. That is a Thursday?

Q. Did not your manner or what you said inform Mr. Ritch that in your mind there was some doubt about him?

A. Well, Mr. Parsons, I am a very excitable man, I was a good deal excited at that time.

Q. What I wish now to ascertain is whether you

did not show some excitement at that time?

A. I guess I did.

Q. And he showed his resentment?

A. I think so.

Q. And when you subsequently wrote to Miss Amelia Joyce you called attention to his becoming as white as a sheet of paper, did you not?

A. Yes, sir.

Page 713–714

Q. Is it your best recollection that it was as early as ten o'clock on the following morning, the morning of Saturday, that you saw Mr. Fayerweather?

F. 1101 A. Yes, sir.

Q. With the exception of the time that he was seen by Dr. Vedder on that morning, were you with him continuously from the time that you first went down to the time that you left to go to Messrs. Arnoux, Ritch & Woodford's office?

A. Almost continuously. I remember going in the hallway once or twice to speak to Miss Joyce about some matters and then going back to Mr. Fayerweather.

Q. So that during this long period from your reaching the house down to about 12 o'clock when you were with Mr. Fayerweather, were you two alone?

A. Miss Joyce when I first came in produced the letter of Mr. Ritch and wished Mr. Fayerweath-

F. 1102 er to read it. Then after that she went out of the room, and as I remember no one was in the room with us at that time until the doctor came.

Q. Now, down to what part of Saturday was it in your mind that the codicil of that day, November 15th, was to be executed on Monday?

A. Until Dr. Vedder told me. As I remember it Dr. Vedder came in and interrupted us while we were talking. I left the room so as to allow——

Q. A. All I wish is to fix the time, I want to find out down to what part of the day. down to what hour, and, if possible, down to what minute, it was

in your mind that this codicil was to be executed on Monday?

A. Somewhere in the neighborhood of 12 o'clock.

Q. At that time, up to the time of his conversation with Dr. Vedder, what was in your mind about the probable length of life still left to Mr. Fayerweather?

A. Founded on my talk with Vedder—I thought he would live for some time yet, down to February or March.

Q. In the conversation which you had with Mr. Fayerweather between 10 o'clock or thereabouts and 12, did you talk about business subjects?

F. 1103 A. Almost exclusively.

Q. Business relating to his firm?

A. No, sir.

Page 715

Q. Did he give any instructions, or was anything said about changing that provision?

A. No, he told me that was settled; waved his hand to close the discussion.

Page 716.

Q. At what hour in the morning did he sign that order for $100,000 of bonds to Mrs. Beardsley?

A. Between 10 and 12; somewheres, probably in the neighborhood of eleven; well, it must have been between ten and eleven.

F. 1104 Q. Was the draft of the note which you wrote written in his sick room or did you go in the sitting room to write it?

A. I think it was written in the sitting-room, but I can't remember where I wrote that.

Page 723

Q. Do you remember that before Mr. Grout, Mr. Browning and Miss Amelia Joyce went into Mr. Fayerweather's bedroom, they with you and Mrs. Fayerweather and Miss Amelia Joyce, were in the sitting-room together?

A. Yes, sir.

Who introduced Mr. Grout and Mr. Browning to the persons who were there?

A. I introduced them to the ladies.

Q. Whom did you introduce them to?

A. Mrs. Fayerweather, Miss Amelia Joyce, and Miss Lizzie Joyce.

Q. Can you recollect what you said in explanation of their being there?

A. I cannot remember giving any explanation at all.

F. 1105 Q. Before you went to Messrs. Arnoux, Ritch & Woodford's office, what, if anything, was said between you and Miss Amelia Joyce about your own going down town to have the codicil prepared?

A. When Dr. Vedder suggested that if I had any papers for Mr. Fayerweather to sign I should have them signed soon, Miss Joyce was in the room, as I remember and I turned to her and asked her to arrange to have the doctors there, as they were there before. Miss Lizzie Joyce was in the house, and I thought I would be able to get through and back again before four o'clock and we fixed that time.

Page 724

F. 1106 Q. Fix, as near as you can, the hour when the codicil of November 11 burned up.

A. I think it was done some time—well, late in the afternoon I think.

Q. Fix, as nearly as you can, the time when there was conversation about its being burned up, between Mr. Fayerweather, Miss Amelia Joyce and yourself?

A. That was soon after the signing of the first, as I remember; that was soon after; it must have been four o'clock, if I remember.

Q. Is that as near to the time as you can put it, about four o'clock?

A. Yes, sir.

Q. After the execution of the codicil, and after

Messrs. Grout and Browning had gone, did Mr. Fayerweather say anything to you upon the subject of the execution of the codicil?

A. The only remark I can recall was to put our heads together and find places to put the money.

Q. When did he say that to you?

A. That was after the first time I went in to see him after the signing of the codicil.

Q. Was there anything more specific than that; have you stated all that he stated upon that subject?

A. I believe I said all. There was nothing more specific than that, and I believe I have said all
F. 1107 that he said upon the subject, that is, after the signing.

Page 725-726.

Q. I will put the specific question. Have you, with Messrs. Ritch and Bulkley, joined in an instrument divesting yourself absolutely of the residuary estate?

A. Absolutely; we have joined such an instrument, divesting ourselves absolutely of any interest in the residuary estate.

Q. (Handing the witness paper.) Will you look at the paper which is handed to you and state whether that is the paper introduced by Judge Stoddard at my request?

Mr. Rollins: What is the date of this?

F. 1108 Mr. Parsons: The 24th of February.

The Witness: 24th of February, 1891; that is the paper; yes, sir.

Mr. Parsons asks to have the paper marked for identification.

Paper marked Proponents' Exhibit G.

By Mr. Coudert:

Mr. Vaughan, you stated for the first time, I think in answer to a question of Mr. Parsons, that you had concluded on the 15th to have the codicil executed on that day, in consequence of what Dr. Vedder said; was that so?

A. Yes, sir.

Q. Before that had you intended to have it done at a later date?

A. Yes, sir.

Q. Either Monday or Tuesday, or another time?

A. Probably Monday.

Q. Did you tell him when you made that remark, that you did intend to have one executed; what did you say in answer to him?

A. I answered Monday; I made the reply that Monday would answer.

Q. What did he say to that?

F. 1109 A. He said it had better be done to-day.

Q. What reason did he assign for that?

A. I don't know that he assigned any reason.

Q. Did you ask him? A. I did not.

Q. Did you know what he meant?

A. I thought that he thought that the patient probably had a chance of dying.

Q. Had a chance, as you express it? A. Yes, sir.

Q. Was exposed to the risk of death?

A. You must remember that he had already told me that he would live until March.

Page 727

Q. Did you not ask him why he had changed his mind, were you not very much surprised?

A. I was very much surprised and astonished;

F. 1110 yes, sir.

Q. And without any explanation you accepted that and had the paper executed?

A. You must remember that I had been talking for two hours with that gentleman.

The Surrogate: Do you mean Mr. Fayerweather?

The Witness: Mr. Fayerweather, from ten to twelve o'clock, and found his mind clear.

Page 827–828

By Mr. Rollins:

Q. The second letter which was delivered on Satur-

day begins as follows: "I have examined"——

Witness: On Friday you mean?

Q. It was not true as an actual matter of fact?

A. (Interrupting) It was not true as an actual fact that he had examined them at that time.

Q. And you caused it to be prepared in that way?

A. I wrote the letter, it is in my handwriting.

Q. And your intention was to deliver the first one and then the other?

A. Yes.

Q. Did you read this over to Mr. Fayerweather, this letter?

F. 1111 A. I am not sure that I read it over to him.

Q. He knew what it was when he signed it, didn't he?

A. Well, I presume he did; he signed it, but I am not sure that I read it over to him.

Page 829.

Q. Do you think you allowed Mr. Fayerweather to sign a paper which contained—I will call it an erroneous statement, as it certainly was, without calling his attention to the fact?

A. I think I did in that instance.

Q. Was it true—was the statement contained in this second letter that the will—the original will and the first, second and third codicils had been

F. 1112 examined by Mr. Fayerweather true at the time that you delivered the second letter to Mr. Fayerweather, Mr. Ritch?

A. No; it was not true.

Q. It was not true even then?

A. No, sir. You know I stated before in my examination that I did not see Mr. Fayerweather on Friday at all.

Q. Ah, but Mr. Vaughan, you must not forget that the sentence about which I am examining you is this: I have examined my original will and the first, second and third codicils thereto, handed by you to

Mr. Vaughan at my request." The words "handed by you to Mr. Vaughan at my request," meant something?

A. I have already told you, Judge, that that statement was not exactly correct.

Page 831.

Q. But why did you want to tell Mr. Ritch an untruth that Mr. Fayerweather had examined the original will which Mr. Ritch had handed him?

Q. How did that help you, Mr. Vaughan?

A. I did not regard it as an untruth in any
F. 1113 sense.

Page 832–833.

Q. One other thing, Mr. Vaughan. You went to see Mr. Ritch three times, once on Thursdayand twice on Friday. I believe that was it?

A. I think I said two or three times on Friday. I am not positive, but what I may have seen him three times on Friday.

Page 833.

Q. Now you said at page 712 of the testimony that on Friday that whatever distrust you had of Mr. Ritch has been entirely removed?

Q. Tell me anything he did to remove it?

F. 1114 A. Well, I cannot remember.

Page 835.

Q. And it was the exhibition, was it not, Mr. Vaughan, these papers by Mr. Ritch—the furnishing by him copies of these papers and some thing else in the conversation that you cannot recall, that removed your distrust?

A. In conjunction with what was said there, that removed my distrust.

Exhibit No. 93.

REV. DR. WM. LLOYD'S SURROGATE TESTIMONY.

F. 1115 Page 885.

A. At about 5 o'clock on that afternoon I went, as had been my custom for two years past, to Mr. Fayerweather's. The butler answered the door. My question to him was, "Well, John how are they all to-day?"

Page 887–888

Q. Now, will you go on?

A. After Mr. Vaughan went upstairs, myself, Mr. Beardsley, Mrs. Fayerweather and Miss Joyce, not Miss Amelia Joyce, Miss Lizzie Joyce, went into the dining-room to take dinner. I had said I would like to see Mr. Fayerweather. Mr. Beardsley said that if any person should see him, if he was dying, he thought it
F. 1116 should be his pastor. Now by whom the reply was made to me that Mr. Vaughan objected, I cannot tell, because the reply was made at the table. After the dinner Mr. Beardsley and myself went into the parlor. I again said to him, Morris, I would like to offer a prayer by Mr. Fayerweather before he dies; as Mr. Fayerweather had many times said to me, "Dominie, I would like you to be with me when the end comes." Mr. Beardsley left the room, went into the dining-room, returned to me and said, Mr. Vaughan thinks it is not advisable.

Q. You said you visited Mr. Fayerweather last summer, and saw him frequently during the fall?

A. Yes, sir.

Q. Did you observe any change in Mr. Fayerweather's condition from which you had observed previous to last summer?

A. Do you mean his mental or physical condition.

Q. Either mental or physical.

Page 889

F. 1117 Well, his physical condition?

A. Yes, I did.

Q. In what respect was he changed?

A. His hearing had grown dull and his eyesight imperfect.

Page 890.

Q. When did you first observe that Mr. Fayerweather showed some dullness of hearing?

A. Fully one year before he died.

Q. Upon that did you cease conversation?

A. No, sir; simply raised my voice a little higher.

Pages 891

F. 1118

Q. Did he wear glasses?

A. Yes, sir.

Page 893.

Q. Going there about what hour did you say?

A. Five o'clock.

Q. Five or half-past five?

A. Well, I did not find it necessary to look at my watch. My rule has been to leave my study when my work was finished, for two years, and to dine at Mr. Fayerweather's house.

Exhibit 94.

EXTRACT FROM STEWART L. WOODFORD'S

F. 1119

SURROGATE TESTIMONY.

Page 107.

Q. And did he insert any new legatees or strike out any?

A. My impression is that the list of college legatees was changed once or twice during the few days preceding its execution by direction of Mr. Fayerweather. He was in the office a good many times examining the list with a great deal of care, and I think that it underwent several changes before it took its final shape.

I caused Mr. Fayerweather's attention to be called to the fact that the devise of the residuary clause under the laws of the State of New York might be invalid.

F. 1120 Q. Very well; and do you remember that the tenth clause contains this provision?

A. I remember that provision, and I say that seeing that provision, not the amount of the legacy, I felt it my duty to have Mr. Fayerweather advised that that paragraph of the will might be invalid.

Page 113

xxx A. I advised Mr. Ritch that he should get from Mr. Fayerweather a recognition of the possible invalidity of the will on account of this possible excess of bequests.

Q. Was that communicated so you would not be charged with overlooking it?

A. So that our office might be free from the responsibility of advising improperly.

Page 137.

xxx A. I had an impression at that time that Mr. Fayerweather's estate was somewhere between two and a half million and three millions of dollars.

By Mr. Rollins:

Q. And growing?

A. Mr. Fayerweather was an exceptionally able man—a very good business man, and his estate
F. 1121 was certainly growing.

Page 140.

Q. A very wealthy man—he is a very wealthy man?

A. To estimate him from our legal standpoint, he is a very wealthy man.

Page 147.

Q. And now what did he do, as you understood it, by this codicil?

A. He gave his residuary estate to Mr. Bulkley and to Mr. Ritch.

Q. To themselves personally and to their heirs forever.

A. Yes.

F. 1122 Absolutely, without qualification?

A. That paper certainly gave that estate to them without qualification.

Q. Without qualfication?

A. Yes.

Q. And that was Mr. Fayerweather's purpose, as you understood it?

A. I believe that it was.

Q. He gave it to them for their own use absolutely, without qualification?

A. So far as I know.

Q. You never have understood that Mr. Ritch was a relative of Mr. Fayerweather's have you?

A. No. sir.

Q. Or Mr. Bulkley? A. No, sir.

Page 160

Q. Did Mr. Fayerweather tell you anything about discretionary authority?

A. No, but you have asked me what I infer was in Fayerweather's mind. I infer that he said that one of the witnesses was a very honorable man, and the other a good associate. I infer that he was referring to this discretionary power.

F. 1123 Page 165

xxx A. I was not consulted with regard to that first codicil.

Page 172

Q. And you had a really serious anxiety that he should understand the effect of that codicil?

A. I had that interest or desire that lawyers ought always to have that the client should understand what he is doing.

Page 174

xxx Q. He had chosen the colleges with great care—he had been years in making up his mind as to what he should select, he had guarded against dangers
F. 1124 or changes of their condition by this discretionary power which he had lodged in his executors. He certainly wanted to give that money to the colleges, and he wanted to have some intelligent, discreet person whom he could trust, to exercise that power, and I am infering from what he said that he trusted the men he had selected.

Page 179

Q. Did you suggest to him the wisdom and propriety of consulting any person outside of your office?

A. I did not.

Q. Did the wisdom and propriety of such a consultation occur to you?

A. It did not.

Q. Does it now?

A. It does not.

Q. In spite of the fact that Mr. Ritch, your partner, is made the beneficiary of the enormous revenue of this estate?

A. Not the sole beneficiary.

Q. Well, the half, or a third, the half under this codicil?

F. 1125 A. Mr. Fayerweather was then a man in active business, thoroughly—

Q. (Interrupting). No; wait a moment General, I will let you go on with that a little later, but please answer my question; did you ever talk with him as to the propriety of taking independent advice?

A. It did not occur to me at all. We had been Mr. Fayerweather's lawyers for a great many years.

Page 187

A. I think that Mr. Ritch told me that Mr. Bulkley did not know that he was a residuary legatee.

Page 200

F. 1126 Q. Did you have any instructions from the testator as to whether Mr. Vaughan was to be included in or excluded from the powers, privileges and advantages of this residuary estate?

Page 201

The Witness: I do not feel at liberty as a lawyer to to answer that question.

Page 205

Q. And you swear, do you, that it did not occur to you, when that codicil was drafted, whether Mr. Fayerweather intended Mr. Vaughan to be one of the residuary legatees or not?

A. Mr. Fayerweather gave me no instructions.

Page 208

Mr. Rollins: xxx I don't want this witness to instruct your Honor. I want to show that this witness is disingenuous in that he did not call it to the attention of the testator, and that one-third of three millions is not so much as one-half of three millions of dollars.

Page 211

xxx Q. Did he ask you whether that language was broad enough to include Mr. Vaughan as a sharer in the residue?

A. You have brought that back to my mem-
F. 1127 ory.

Q. I am very glad I brought something back to your mind?

A. During the conversation that proceded the execution of what you call second codicil A, Mr. Fayerweather said either in words or in substance that he wanted Mr. Vaughan to be executor, but that he did not intend to give him a share in the residuary estate.

Page 213

Q. Did you evade, but I will not repeat my question; do you mean to have us understand that in all these conferences, in all these examinations of these papers, in all the reflection that you have given to the sub-
F. 1128 ject, that it never has occurred to you, until you just now stated it on the stand that Mr. Fayerweather told you that while he wanted to include Mr. Vaughan among his executors, he did not intend to give him a share of the residue?

A. The instructions that I had for the preparation of the second codicil were that Mr. Vaughan should be made an executor, but not that Mr. Vaughan should be given a share in the residuary estate. The language you have asked me quite fully this morning, as to whether these instructions were written or verbal, and from whom I received them, I did not recall and so testified. When

you began your special examination as to the execution of the second codicil I did recall. It came to me like a flash in the conversation as I have endeavored to testify, that Mr. Fayerweather in that conversation and before he signed the second codicil said in substance that he meant Mr. Vaughan should be an executor, that he did not intend to put him into the residuary clause, and that the paper which he had upon reading over—that paper seemed to him right—or words to that effect.

Page 214

Q. Did Mr. Ritch know that Mr. Vaughan was not named a residuary legatee?

F. 1129 A. I presume he did but I don't know.

Page 215

Q. Will you swear that the question whether this second codicil "A" should be so worded as to exclude Mr. Vaughan from the benefits of the residue was not a matter of conversation between you and Mr. Ritch?

A. I think it was not.

Q. Will you swear that it was not?

A. I understood our instructions to be to so prepare that codicil as to make Mr. Vaughan a co-executor but not to put him into the residuary clause.

Q. Will you swear that that subject was not talked about between you and Mr. Ritch?

F. 1130 A. No; it may have been and it may not.

Page 218

(Referring to the dying-day codicil of Nov. 15th, 1890).

Q. Now, General Woodford, were you ever in direct communication with Mr. Fayerweather respecting the preparation of the fourth codicil—direct I mean?

A. By direct you mean personal?

Q. By direct I mean direct, that is a good word.

A. If by direct you mean personal, by word of mouth, I was not.

Q. Did Mr. Fayerweather in writing ever ask you to draw this fourth codicil?

A. He did not.

Q. Who did?

A. Mr. Vaughan.

Q. How did you know he had any authority to ask you to draw this codicil?

A. He told me that he had come from Mr. Fayerweather with Mr. Fayerweather's instructions.

Page 219

Q. Was there anything brought to you except the will and codicil?

A. In writing?

F. 1131 Q. In writing.

A. No.

Q. Or anything else except the utterance of Mr. Vaughan?

A. No.

Q. That is all?

A. Yes.

Q. The only ground your believing that you were receiving instructions from Mr. Fayerweather was that Mr. Vaughan told you so?

A. I knew Mr. Vaughan to have been Mr. Fayerweather's business associate.

Q. This was at what hour that Mr. Vaughan brought the instructions?

A. A few minutes to one o'clock of that day.

Q. At what hour did the testator die?

F. 1132 A. I do not know.

Page 222.

Q. Vaughan, I mean?

A. Through Mr. Vaughan I received what I regarded as instructions from Mr. Fayerweather, and I at once under these instructions drew the fourth codicil.

Q. You would have thought it very impertinent to have asked Mr. Vaughan why these changes in the testator's testamentary purpose had been made; would you not?

A. I should not have thought it pertinent to the matter under consideration.

Page 225.

Q. And you are sure that you did not hear that Mr. Fayerweather was in great danger of dying that day?

A. Mr. Vaughan told me that he was very, very sick.

Q. Yes, but you have just said that he did not tell you that there was any likelihood of his dying that day.

A. I don't recall that he did; he may have.

F. 1133 I don't recall.

Q. You have told us many times, General, sometimes when you were not asked to tell, about the fine system of routine that you have in your office, of the course that is invariably pursued there in the preparation of important papers, and at last, when you have reached that pitch of perfection that makes it, in accordance with the usage of the office, your time to interfere, they are placed all nicely drawn on your desk. Will you tell us why there seems to have been so great departure from that course, that uniform, systematic, desirable course on that day?

A. Mr. Vaughan came to the office a little after one o'clock of that day. He brought me instructions from Mr. Fayerweather. He told me that Mr. Fayerweather was very sick. That he wished the paper drawn

F. 1134 at once. I sat down and drew the paper, having the will and codicils as I recollect—I think the originals. I think Mr. Vaughan had been with him. I prepared this paper, and when it was finished Mr. Vaughan said he wished to take it up to Mr. Fayerweather and he received it at once.

Page 226

Q. You didn't have any curiosity, and you didn't make any guess as to why he was in such a hurry?

A. As to why I made a guess. I inferred that Mr. Fayerweather was pretty sick.

Q. And that if he did not execute that codicil mighty quick he would die without executing it?

A. I knew he was a very sick man, and I inferred he wished the papers pretty promptly.

Q. How did you infer that Mr. Fayerweather was in haste? Your inference was that Mr. Vaughan was in a great haste?

A. Because Mr. Vaughan was in a hurry I presume Mr. Fayerweather was.

Page 230.

Q. When this witness from your office, Mr.
F. 1135 Grout and Mr. Browning went to Mr. Fayer-
weather's house to act as witnesses, did they go pursuant to your request?

A. Yes.

Q. For the purpose of being witnesses?

A. Yes.

Q. Did Mr. Vaughan, who, as you understood, spoke for the testator in asking for the preparation of this paper, tell you that he was requested by the testator to bring witnesses to the codicil?

A. He did not tell me that he was requested by the testator to bring witnesses to the codicil.

Q. That was a voluntary offer on your part?

A. It was not.

Q. How then?

A. Mr. Vaughan asked me if there was anyone
F. 1136 who could go up to witness the codicil for they
might not be able to find witnesses at the house. I think that was about what he said.

Q. And so you asked Mr. Browning and Mr. Grout to go with him?

A. I asked Mr. Grout to find someone in the office who could go up, and to go up with Mr. Vaughan to Mr. Fayerweather's house.

Page 231

Q. Has he had to do considerable with the executing of wills?

A. Yes, Mr. Grout is the first assistant in the general department of our office.

Q. And has to do a great deal with wills?

A. Yes.

Q. And superintending the execution of them?

A. Yes.

Page 232.

Q. Did you not on that occasion think it important to suggest to Mr. Grout that as you had not received any instructions directly from the testator it would be safe and wise for him to read that will aloud to the
F. 1137 testator to see if he knew anything what was in it. Did you?

A. I gave no such directions to Mr. Grout.

Q. You don't know what Mr. Grout did?

A. I don't know what occurred.

Q. You were not there?

A. No, I was not there.

Exhibit No. 95.

EXTRACTS FROM TESTIMONY OF THOMAS G. RITCH BEFORE JUSTICE TRUAX.

Page 282.

F. 1138

Q. Please look at the original will, and say whether the engrossed will, as actually executed by Mr. Fayerweather, was prepared in your office?

A. It was.

Q. Was it prepared under your direction?

A. It was.

Page 283.

Q. Please look at the paper I now hand you, dated October 6th, 1884, and signed D. B. Fayerweather. State whether you have ever seen that paper before.

Q. In whose hand-writing is it?

A. In mine.

Q. Do you mean that to apply to the signature as well?

A. No, sir; signature is Mr. Fayerweather's.

Page 284.

Q. Was the original will handed to you for safe keeping?

A. It was.

Q. Immediately after its execution?

A. Yes.

Q. And on the same day that paper was handed to you?

F. 1139 A. Yes.

Q. What did you do with those two papers?

A. I think it was put in the safe in the office.

Q. Please look at the first codicil to Mr. Fayerweather's will which has already been put in evidence, and state whether or not that was drafted by you.

Page 285.

A. I think so.

Q. And was that engrossed paper, as actually executed, prepared in your office?

A. Yes, sir.

Page 286

Q. Was this envelope and the paper enclosed ever in your custody?

F. 1140 A. From the time I received it until Mr. Fayerweather's death, with the exception possibly of a day or two in March, 1889.

Page 290

Q. Is that a copy, to the best of your recollection, of the paper that you drafted?

A. I think it is.

Q. Look at the paper now shown, you, dated March 22, 1889, and state whether you have ever seen that before.

A. I have.

Q. Did you ever have that in your custody?

A. I did.

Q. When did you first see it?

A. In its complete form, I think the day of its date, March 22, 1889.

Page 291.

Q. During what period did you have that paper in your custody?

A. I think from the date, or about the date, till after Mr. Fayerweather's death.

F. 1141 Page 301

Q. Look at the paper which I now show you and state whether it is a letter written by you upon that same day, the 14th day of November, 1890.

A. It is a letter written by me. I think this is the letter which has the date wrong.

Q. That is dated the 13th, and it was in fact written on the 14th?

A. I think so.

Page 304

Q. When was this fourth codicil prepared?

A. On the day of its date, I believe.

Page 305.

Q. November 15th, 1890?

F. 1142 A. Yes, sir.

Witness: I was present when instsuctions were given to prepare it.

Q. And by whom were they given?

A. Mr. Vaughan.

Q. Mr. Vaughan came to your office on the day after you delivered to him the letter of November 14th, 1890, which is marked "Exhibit L", together with the private memorandum to which you referred in the letter, and requested that a codicil—a further codicil—be prepared of the tenor of this instrument, this fourth codicil; is that the fact?

A. I think so.

Q. You saw him, did you not, yourself?

A. I saw him, yes.

Q. Is it then your recollection; you say you think so?

A. I was in a hurry to get away, he gave full instructions, or whetner I, after talking with him a few minutes took him into General Woodford's office, and left him with him, I don't remember.

Q. When you say you think so, I ask you if that is your recollection?

A. That is my recollection.

F. 1143 Q. You have taken possession of the estate, the three gentlemen named, I suppose, and you have been acting as executors?

A. We have.

Page 307.

Q. Who were Mr. Fayerweather's next of kin?

A. Mrs. Fayerweather, the widow, Mrs. Beardsley, a niece, Mrs. Achter, and Miss Emma S. Fayerweather, who were also nieces.

Page 308.

Witness: I would say with regard to that of October 6th that I am uncertain about it; I think it may have been by General Woodford, but I think by my suggestion.

F. 1144 Q. What I wish to ascertain is whether Mr. Fayerweather made any suggestion looking to that paper?

A. He did not.

Q. I ask the same question in respect of the paper which is dated December 11, 1884, Exhibit G. At whose suggestion was that prepared?

A. That was prepared at mine.

Q. Did Mr. Fayerweather make any suggestion looking to the preparation of that paper?

A. I think nothing whatever.

Page 313.

A xxx Q. And generally with regard to institutions he made a sort of general remark that there were some that he did not know very much about, and he left it to our judgment.

Q. Was anything said by him as to what you were to do in case of his death, what he wished to do?

A. Exercise our judgment was the substance of what he said. While he was talking, while we were talking, I made memoranda with a pencil on a small piece of paper as an aid to my recollection.

F.1145 Page 314.

A. When that memorandum was signed Mr. Fayerweather said, in substance, that Mr. Bulkley and myself must use our best judgment, or something equivalent to that, with regard to what came into our hands.

Page 316.

Q. The question I want to put to you is this: had there been at any time any instructions to you from Mr. Fayerweather, directly or indirectly, to the effect that you were to hold the residuary estate to be applied primarily to the institutions mentioned in the ninth clause of his original will.

Page 316–317.

F. 1146 Mr. Parsons: We would like to inquire for whom, in putting this question, Col. James is acting.

Mr. James: I am acting for the widow and for Mrs. Achter and Emma S. Fayerweather.

Mr. Parsons: The next of kin?

Mr. James: Yes, blood relations.

Mr. Nash: We think they have no standing in this controversy until after the decision of the main question by your Honor.

Mr. James: I suppose this case is to be tried as a single case.

The Court: I shall allow Col. James to ask the question.

Mr. Nash: I should like to state my objection.

I object that the widow and next of kin, under the pleadings in this cause, have no standing in Court in reference to the litigation of the plaintiffs to establish a trust for institutions different from those created by the deed of gift; and that their interest in the case is only consequential upon certain decisions to be made or ultimately to be given by your Honor.

Objection overruled. Exception.

Mr. Parsons: I wish to have the same objec-
F. 1147 tion put upon the record in behalf of the clients I represent.

The Court:

Objections overruled. Exceptions.

Q. Were you Mr. Fayerweather's professional adviser for several years prior to 1884?

A. I was.

Q. At the time of Mr. Fayerweather's death in November, 1890, did you and Mr. Vaughan and Mr. Bulkley immediately thereafter take possession of his estate?

A. We did.

Page 324.

Q. When did you pay that $10,000 bequest
F. 1148 that he gave to his beloved wife by the third clause of his will?

A. I think as soon as we were qualified to sign checks.

Q. Did you pay it until after the probate of the will and of the codicils in the Surrogate's Court in the spring of 1891?

A. I don't remember.

Q. Will you testify that you did pay it before?

A. Not before we qualified; I think Mr. Vaughan advanced some money personally, but how much I don't know.

Page 327.

Q. Did you ever represent to Mrs. Fayerweather that you and your co-executors held this residuary estate of Daniel B. Fayerweather upon a trust for the benefit of any Colleges or other institutions or corporations?

xxxx A. I don't remember that I did.

Q. Did you ever so represent to Mrs. Achter or Miss Emma S. Fayerweather?

A. I don't remember.

Q. Did you not insist and claim that you held that property absolutely, you and your co-executors, to do with as you pleased?

F. 1149 A. I did; wherever it was asked.

Page 328

Q. Did you ever since the death of Daniel B. Fayerweather represent, directly or indirectly, to his widow, Lucy Fayerweather, or to his nieces, Mrs. Achter or Miss Emma Fayerweather, that you and your co-executors took this residuary estate upon a trust for the benefit of any benevolent,charaitable, literary, scientific, educational or religious or other corporations, societies or associations?

Objected to by Mr. Arnoux as too general.

F. 1150 Objection overruled. Exception.

A. I never did.

Q. Did you ever represent to Mrs. Lucy Fayerweather, the widow, that she was entitled to any interest in her husband's estate beyond the amounts directly specified in the will?

A. Not entitled.

Page 329

The Court: Perhaps it is proper to state what the views of the Court with respect to Col. James' position are.

Col. James' clients are made parties to this action because one of them was the widow and the others the next of kin of Mr. Fayerweather, and as such, in the absence of the will, would be entitled to this estate.

If this residuary legacy is set aside, in whole or in part, as such widow and next of kin they would be entitled to that money.

That there is or was an agreement of release between the executors and them is immaterial. Because in this action when the release is proved they may avoid the release, the same as in an
F. 1150 action for negligence, where the defendant sets up a release, and the plaintiff responds to it by saying the release was obtained by fraud.

It was unnecessary for him to set up the making of releases or to attack the making of releases in his answer. He could have done done it without having alluded to it in the pleadings.

Those are my views upon the position of Col. James.

Page 331

Q. That instrument, Exhibit J1, being the deed of gift, was delivered to Mr. Nash and Mr. Stoddart on the 24th day of February, 1891, was it not?

A. I presume so.

Q. Didn't you and your co-executors from the
F. 1152 time of making and delivering that deed, represent and claim to all parties interested in the estate that you had an absolute right to give the property as in that instrument provided?

A. We did.

Q. Did you explain directly or indirectly to Mrs. Fayerweather or to Mrs. Achter or Miss Emma S. Fayerweather their rights to this estate under Section 1 and 2 of Chapter 360, Law of 1860, in respect to bequests and devises to institutions?

A. No, sir.

Q. In your answer in this case, at folio 29, I see you say this: "This defendant therefore claims and insists that so much of said estate as would have belonged to said widow and next of kin in case the claim of the plaintiffs should be decreed to be valid, passed to him and said Bulkley and Vaughan individually ; and from them under said deed of gift to the beneficiaries therein named by and with the consent of the plaintiffs." Now, at the time you made that deed of gift, did you have any release from Mrs. Fayerweather, the widow, in February, 1891?

A. No, sir.

F. 1153 Q. At that time did you have any release from Mary W. Achter, the niece?

A. No, sir.

Q. At that time did you have any release from Emma S. Fayerweather, the niece?

A. No, sir.

Page 343

Q. Did it exceed $5,000,000—the gross estate?

A. At the time of his death, my recollection is that I carried it in my head, five million.

xxx Q. In round numbers it was five millions, was it?

A. Five millions.

Page 344

Q. After that reading did you retain possession

F. 1154 of the will and codicils and bring them to your office?

A. I did.

xxx Q. Before the final termination of the controversy before the Surrogate, was not the deed of gift, Exhibit J1, produced in the Surrogate's Court, and there put in evidence?

A. It was.

Page 353

Q. Reference is made in the release executed by Miss Lucy Fayerweather to the executors, Exhibit No. 5,

to an instrument executed on the 5th day of March, 1891. Was such an instrument delivered?

A. It was.

Page 364

Q. You testified in answer to Judge Arnoux's question that at the funeral of Mr. Fayerweather, or soon after the funeral of Mr. Fayerweather, you read the will and codicils ; do you remember the occasion?

A. I do.

Q. Did you read these private memoranda on that occasion?

F. 1155 A. I did not.

Page 365

Q. Do you know of any money being paid from the estate of Daniel B. Fayerweather to the widow, Lucy Fayerweather, until after she had executed this instrument dated March 5, 1891, which has been marked "Exhibit No. 8?"

A. I don't remember when payments were made. I presume not till after.

Page 372

Q. In whose handwriting is that paper?

A. It is all Mr. Fayerweather's.

Paper marked "Exhibit No. 27" and read in evidence by Mr. Parsons, as follows:

F. 1156 (Ex. No. 1 Contestants.)

FAYERWEATHER & LADEW,
NEW YORK.

P.O. Box 2701. Sept. 23, 1884.

Mr. Ritch
Dear Sir—

The names of my Brother's Daughters are Mary W. Achter wife of Henry B. Achter and Emma S. Drury wife of Dudley Drury of Muscatine, Iowa.

You may make my wife yearly allowance $15,000 instead of $12,000 and perhaps Mrs. Beardsley $100,000 instead of $50,000.

Yours truly,

D. B. FAYERTHER.

N. B. I presume this would go to her children in case of her death.

Q. The last paper begins with, "The names of my brother's daughters are Mary W. Achter, wife of Henry B. Achter, and Emma S. Drury, wife of Dudley Drury, of Muscatine, Iowa." Are they the two ladies
F. 1157 to whom you have referred as Iowa ladies?

A. Yes.

Page 373.

Q. Can you fix the date, or approximately the date, when the purpose to execute such an instrument was reached?

A. The conclusion was reached when the contest was pending.

Q. Can you remember how long before the 24th day of February, 1891, which is the date of the deed of gift?

A. I should say a week; it might be more or less.

Q. Look at the paper which Mr. Holden has brought here, and say whether that enables you to fix the date with absolute accurancy?

F. 1158 A. It was prior to February 14, 1891.

Page 382.

xxx Q. "Mr. Vaughan say that Mr. F is too ill to be seen." Was that a fact that Mr. Vaughan said to you Mr. Fayerweather was too ill to be seen?

A. That is what he said.

Page 581

I offer in evidence the judgment dismissing the complaint in Reynolds against Ritch, dated the 25th of April, 1893, and filed the 13th of June, 1893.

The Court: Dismissed upon the merits?

Mr. James: No, sir, not at all; dismissed by default for failure to appear.

xxx. The Court: That there may be no doubt about it; it is taken by the Court as not establishing an adjudication of the controversy in this action. If there are some other things that make it relevant, you may read it in evidence.

Page 671-2

Q. Won't you state it as you remember it?

A. I said that I had been her husband's friend, and would be hers; that any service I could
F. 1159 render as a lawyer I would ask her to call on me for as a part of my duty; that I expected the next day to give her a check for $10,000, advised her to put it in the Fifth Avenue Bank as a good bank for her to make a deposit; that the executors did not wish her to have any anxiety with regard to money matters, or to trouble herself with regard to the payment of bills; that we wanted her to live there, keep up her establishment as she was accustomed to, and have no care or anxiety about it. She asked me to say that again, I think, or something in substance, and I repeated it, giving those assurances. I don't know the exact date; it was the date before we received notice of the contest.

xxx Q. I show you a letter dated December
F. 1160 13th, 1890, and ask you if that letter is in your handwriting?

A. Yes, sir.

Q. Did you send a letter to Judge Beardsley at or about the time of its date?

A. I did.

(See Appendix of Exhibits No. 42, Page 243-244.)

Exhibit 96.

EXTRACTS FROM DEPOSITION OF HENRY B. VAUGHAN BEFORE JUSTICE TRUAX.

Page 450.

Q. And do you recall that in April or March, 1893, answers or defenses in that suit were interposed by the five institutions who are the plaintiffs here?

A. Yes, sir.

F. 1161 Q. Down to that time did there come to you any notice or intimation of any such claim as by those answers, or by this present suit, is made by these five institutions?

A. No, sir.

Page 455

Q. From the time that you received that letter from Mr. Ritch until after Mr. Fayerweather's death; did it not go out of your possession?

A. It did not.

xxx Q. Was it during that interval ever seen by Mr. Fayerweather?

A. It was never seen by Mr. Fayerweather.

F. 1162 Q. During the period about which you have testified in which you were with Mr. Fayerweather, did you make memorandums of any kind?

A. Yes, sir.

Page 456.

Q. Look at the envelope which is marked "Exhibit Oa", and state whether that contains other memoranda made by you at that time?

A. Yes, sir.

Mr. Parsons: We offer them.

By the Court:

Q. When were those memoranda made?

A. The morning of the 15th.

By Mr. Parsons:

Q. While you were with Mr. Fayerweather?

xxx A. Yes, sir.

Page 457

Q. You brought up the fourth codicil from Mr. Ritch's office, as I understand?

A. No, sir; I did not; Mr. Grout brought it up.

Mr. Arnoux: You accompanied Mr. Grout.

The Witness: Yes, sir, I accompanied him.

Q. Was this memorandum made before or

F. 1163 after the execution of the fourth codicil?

A. It was made before.

xxx Q. On the morning of the 15th, I understand you to say that you were with Mr. Fayerweather from about 10 o'clock until 12, about two hours?

A. Between 11 and 12. Doctor Vedder came into the room, and I left on that account.

Q. Then you left, did you?

A. I left the room first, and remained in the front room some little time.

Page 458

Q. Prior to that time, and prior to the execution of the deed of gift, had there been between Mr. Fayer-

weather and yourself conversations on the sub-

F. 1164 ject of any wish which he might have in respect to the disposition of his residuary estate? Had there been?

xxx A. Yes, sir.

Q. Was there such a conversation on the afternoon of November 15th, and after the execution of the codicil of that date?

xxx A. Yes, sir.

Q. Were you examined in the Surrogate's contest by Messrs. Coudert & Rollins upon the subject of that conversation, and and in answer to them did you state what occurred?

A. Yes, sir.

Q. And is your testimony upon the subject recorded in the printed record of the proceedings before the Surrogate on the contest?

A. Yes, sir.

Q. Were you asked in the Surrogate's contest by Messrs. Coudert & Rollins this question: "After the execution of the codicil, and after Messrs. Grout and Browning had gone out, did Mr. Fayerweather say anything to you upon the subject of the execution of the codicil?

Page 459

F.1165 Mr. Parsons: I wish to show that it has been known to the parties in that proceeding since that time what occured between Fayerweather and himself,and that they have recognized the importance of it by abstaining from examining Mr. Vaughan as a witness, to show that they have known, since February, 1891, that here was the gentleman who knew what Mr. Fayerweather's wishes were, and who knew that they were in accordance with the deed of gift.

xxx Q. Did you, upon your examination in the probate proceedings before the Surrogate, in answer to such question as was last suggested, give this answer: "The only remark I can recall was to put our heads together and find places to put the money."

F.1166 xxxQ. Were you also on that same occasion asked by Messrs.Coudert and Rollins this: "When did he (referring to Mr. Fayerweather) say that to you?" and did you answer: "That was after the first time he said to to me—the first time I went in to see him after the signing of the codicil."

Page 460

Q. From what, if from anything or from anyone, did you take down what is written by you in pencil on the back of Exhibit Oa, that being the envelope which contained Mr. Ritch's letter to Miss Joyce?

xxx Q. Did you take it down from what anyone said?

A. From what was said between Mr. Fayerweather and me that morning.

xxx Q. Do those pencil memoranda made by you on the back of that envelope, Exhibit Oa, correctly show things said by Mr. Fayerweather to you in that interview?

xxx A. Yes, sir.

Page 463–464–465

Q. In this interview did you receive from Mr. Fayerweather instructions with reference to the last codicil, with reference to the preparation of the codicil
F. 1167 of the 15th of November, and did you go down to Messrs. Arnoux, Ritch & Woodford's office with those instructions, after that interview?

A. Yes.

Q. During the interview was anything said between Mr. Fayerweather and yourself with respect to what was to be done with the residue of the estate, assuming that such a codicil as the last codicil was executed by him?

A. Mr. Fayerweather referred to his competency in selecting institutions for benefit.

Q. State what he said.

A. Stated that he was not very well fitted for such purpose, but that he had used his best endeavors and obtained the best advice that he could get,
F. 1168 and then went on and said that there would have to be others found to whom the rest of the money should be given.

xxx A. He said that he had selected, by the best advice that he could get, such institutions as he thought would be proper to be benefitted.

xxx The Witness: He stated after further selections would have to be made.

Q. Do not say referred.

A. Mr. Fayerweather told me then what he had done with reference to selecting those institutions, and stated that other institutions would have to be selected,

and did not refer to any particular institutions that should be by name, but indicated—

By Mr. Parsons:

Q. How did he indicate?

A. Said that the surplus of the money would have to be given to other institutions.

By Mr. James:

Q. What kind of institutions?

A. There was no special kind of institutions referred to; it was left—

Page 465

By the Court:

F. 1169 Q. Have you stated all, now?

A. That is all I recollect on that subject.

Page 465–466

xxx Q. Mr. Vaughan, now state, what, if anything, was said between Mr. Fayerweather and yourself upon the subject inquired about, subsequent to the execution of the codicil.

Same objection.

A. We were to put our heads together and find other places for the money.

By The Court:

Q. That is what he said?

A. Yes, sir; that is what he said, as near as I can remember the words.

F. 1170 By Mr. Parsons:

Q. Were you in the house while the codicil was being executed?

A. Yes, sir.

Q. And did you return to his room immediately after the execution?

A. Yes, sir; not perhaps immediately; I think I accompanied Mr. Grout and Mr. Browning downstairs.

Q. And then you returned to Mr. Fayerweather's room?

A. Then I returned to Mr. Fayerweather's room.

Q. Then there took place this conversation that you have referred to?

A. Yes, sir.

xxx Mr. Parsons: I offer again to show that, upon the probate contest, Mr. Vaughan testified to what occured in an interview with Mr. Fayerweather subsequent to the execution of the last codicil, as testified to by him now.

Mr. James: We make the same objection.

Objected sustained. Exception.

Q. When you were examined in the probate contest was there put to you by Mr. Parsons these
F. 1171 questions and to them did you make these answers (I read from page 724, folio 2172)?

Q. After the execution of the codicil, and after Messrs. Grout and Browning had gone, did Mr. Fayerweather say anything to you upon the subject of the codicil?

A. The only remark I can recall was to put our heads together and find places to put the money.

Q. When did he say that to you?

A. That was after the first time; he said to me as I was speaking here after the signing of the codicil.

xxx Q. Did you so testify?

A. Yes, sir.

Q. Is your recollection distinct that you gave this testimony?

F. 1172 A. Yes; I made that answer, and that was the fact.

xxx Q. Was the letter, Exhibit O, produced by you before the Surrogate, and then and there put in evidence on the contest over the will?

A. I gave that letter to Mr. Parsons, and if I recollect correctly it was put in at the demand of Mr. Coudert.

Page 468.

Q. You have said that you did not show to Mr. Fayerweather the letter that Mr. Ritch had given to you addressed to Mr. Fayerweather. Did you communicate

to Mr. Fayerweather the contents of that letter?

xxx A. No.

Q. Did you ever tell Mr. Fayerweather that you had no moral right to dispose of that property?

A. No, sir.

Q. Did you ever tell him that Mr. Ritch had any such idea?

A. No, sir.

Page 473.

A. What is your question?

The Court:

F. 1173 Q. Did that codicil restore the tenth clause of the will?

A. I guess I am confused. Will you allow me to see it; I am confused.

The Court: Do you remember the contents of that codicil?

A. No, sir; I do not.

The Court: Can you remember the substance of it?

A. Yes, sir.

Q. What is the substance of the codicil?

A. The substance of the codicil was to revoke, as I understand, the bequest of the residue of the estate to Mr. Bulkley and Mr. Ritch.

F. 1174 Q. Was it in substance to restore the tenth paragraph of the will, and give the residue of the estate, in accordance with the tenth paragraph?

The Court: The tenth paragraph gives it to the executors to be divided among the colleges, share and share alike?

A. Yes, sir.

Q. That is the fact is it not?

A. Yes, sir; that is the fact.

Page 476

Q. Did you ever see the draft again?

A. My recollection is that the draft and the en-

grossed copy were put in an envelope together, handed by Mr. Butler to Mr. Fayerweather, and by Mr. Fayerweather handed to me.

Page 480

Q. Have you no recollection whatever?

A. I have this recollection, that I asked Mr. Fayerweather to allow me to go and see Mr. Ritch; to which he demurred, and at my suggestion he allowed me to go and see Evarts, Choate & Beaman.

F. 1175 Page 481—482

Q. Was it not the fact that at that time, on the 10th or 11th of November, you entertained, after reading this will and the first three codicils, some distrust as to what disposition Mr. Ritch might make of the residuary legacy given to him?

A. Yes, sir.

Q. And is it not a fact that that distrust was removed from your mind between that time and the 15th of November?

A. Yes, sir.

Q. When was the distrust removed from your mind?

A. As I remember it Friday.

F. 1176 Q. Friday the 14th of November?

A. Yes.

Page 482.

A. I went out of the room once before the doctor came in.

Q. About what time did the doctor come?

A. Between eleven and twelve.

Q. That was Dr. Vedder?

A. Yes, sir.

Q. And when the doctor came, as I understand you, you went out of the room and did not return to it until after the execution of the fourth codicil?

A. That is as I remember.

xxx Q. How long did you stay in Mr. Fayerweather's

house after you left his room, and before you left the house?

A. Not very long; I could not undertake to say how many minutes.

Q. A quarter of an hour?

A. Oh, no, less than that.

Page 483.

Q. At what time of the day did you make the memorandum upon this envelope which has been marked "Exhibit Oa"; pencil memorandum?

A. Somewhere in the neighborhood of ten and
F. 1177 eleven o'clock in the morning.

Q. In what part of the interview which you had with Mr. Fayerweather on that morning did you make this memorandum, the early part or the latter part?

A. I can't answer that question.

Page 484.

Q. Did you prepare that paper on that morning?

A. Yes, sir.

Paper marked "Exhibit W," and read in evidence by Mr. Root, as follows:

F. 1178 "11 East Fifty-seventh Street.
November 15, 1890.

MR. H. B. VAUGHAN and
MR. F. B. MYRICK.

Gentlemen:—

In addition to the sums already disposed of by you, I wish you to give a further sum of about $100,000 in securities now in my box, of which Mr. Myrick has the key—the securities taken at their value of the day—to my niece, Lucy J., wife of Morris B. Beardsley. This letter will be sufficient authority for so doing.

Truly yours,

D. B. FAYERWEATHER."

xxx Q. Did you make the memorandum, "Mrs. Beardsley, amonnt $100,000 in bonds," before or after you wrote this letter, Exhibit W?

A. Before.

Q. So that you first made that memorandum and then afterwards during the same interview you prepared this letter and had it signed; is that it?

A. I first made the memorandum, and then afterwards, in thinking over the matter, I concluded it best to have the written authority; and I went from the room to the front room and wrote that letter.

Q. And came back and got Mr. Fayerweather's
F. 1179 signature to it?

A. Yes.

Page 486.

Q. You have testified that you left Mr. Fayerweather's room on the morning of November 15, when Dr. Vedder arrived, between 11 and 12 o'clock?

A. Yes.

Q. And that you remained a short time in the house after that?

A. Yes.

Page 487.

F. 1180 Q. Did you see Dr. Vedder during that time?

A. Yes.

Q. Did Dr. Vedder say anything to you at that interview in regard to Mr. Fayerweather's condition and in regard to the execution of any papers which there were to be executed?

A. Yes, sir.

Q. What did he tell you upon that subject?

A. He told me that if I had any papers to which I wished Mr. Fayerweather's signature, I had better have them signed.

Q. Any intimation as to whether they must be signed immediately?

A. I suggested in reply to that that Monday would

answer. In reply he said, "No; they had better be done to-day."

Q. Was that the first intimation that you had had that Mr. Fayerweather was in immediate danger of death or danger of death?

A. I did not understand it even then, that he was in danger of immediate death.

xxx A. Dr. Vedder had told me shortly before, that he thought he would live until March, anyway.

Page 488.

Q. As I understand, you have already testified,
F. 1181 and it is a fact, is it not, that up to that communication by Dr. Vedder, you had no idea of the proposed codicil be executed before Monday at least?

A. No, sir.

Q. By that, you mean that that is the fact?

A. Yes; that is the fact.

xxx Q. Let me ask you, what was the condition of Mr. Fayerweather's eyesight at that time?

A. It was not good, but he could read by the use of glasses.

Q. Didn't he use some peculiar kind of glasses, large ones, to read with?

A. I don't recall that.

Q. He had a good deal of difficulty in reading, had he not.

F. 1182 Q. Did you intend to conceal the contents of that letter of Mr. Ritch from Mr. Fayerweather?

A. No, sir.

Page 490.

Q. You had a conversation with Mr. Fayerweather that morning, did you not, in regard to the making of a further codicil to his will?

A. Yes, sir.

Q. You say you told Mr. Fayerweather that Mr. Ritch was all right?

A. Yes, sir.

Q. Did you tell Mr. Fayerweather that you had got from Mr. Ritch an answer to his letter?

A. No, sir.

Q. Did you tell him that you had got from Mr. Ritch copies of the private memoranda which Mr. Fayerweather had left with him?

A. I don't remember that I did.

Q. Do you remember whether you did or not?

A. My best recollection is that I did not.

Q. Isn't it a fact that you read over those memorandas to Mr. Fayerweather?

F. 1183 A. I don't recollect that I did.

Page 491.

Q. Do you remember whether you did or not?

A. My best recollection is that I did not.

Q. Didn't you read over one of them to Mr. Fayerweather?

A. My best recollection is that I did not read one of them.

Page 492.

xxx A. The letter from Mr. Fayerweather to Mr. Ritch I wrote myself.

Q. Mr. Fayerweather signed it, didn't he?

A. Yes.

Q. Didn't you write it by Mr. Fayerweather's directions?

F. 1184 A. Mr. Fayerweather signed it at my request.

Q. Please answer my question.

A. No, sir; I did not write it at Mr. Fayerweather's directions.

Q. Mr. Fayerweather knew what was in it, didn't he?

A. I don't remember whether it was read to Mr. Fayerweather or not.

Q. Didn't you consider yourself under any obligations, having received a letter from Mr. Ritch directed to Mr. Fayerweather, to deliver it to him.

A. I decline to answer that question.

xxxQ. Didn't you consider yourself under any obligation to deliver to Mr. Fayerweather that letter?

A. No, sir.

Q. That letter was given to you by Mr. Ritch to be delivered to Mr. Fayerweather, was it not?

A. Mr. Ritch did not tell me so.

Q. I understand you to say you did not tell Mr. Fayerweather you had it?

A. You so understand me.

Q. I correctly understand you?

A. I did not tell Mr. Fayerweather I had it.

F. 1185 Page 493

Q. Did you forget to deliver it to him?

A. Not that I remember.

Q. Did you think of it while you were there?

A. I think I must have thought of it when I told him Mr. Ritch was all right.

Q. When you told him Mr. Ritch was all right you think you must have thought of the letter?

A. I think so.

Q. Why didn't you deliver it to him then?

A. I don't know that I can tell you why.

Q. You can give no idea?

A. No.

Q. Mr. Fayerweather was in possession of his senses, was he not?

F. 1186 A I believe he was.

Q. Did you mean to suppress the letter?

A. I have already answered that question.

Q. I would like you to answer it; I don't think you have.

A. No sir; I did not.

Page 494.

Q. Did you not testify before the Surrogate to many things which were said by and between Mr. Fayer-

weather and yourself at the interview in the forenoon of November 15th?

A. Yes, I believe I did.

Q. You testified before the Surrogate to a conversation between Mr. Fayerweather and yourself in the forenoon of November 15th, 1890, about the provision for Mrs. Achter and Mrs. Drury, didn't you?

A. Yes, sir.

Q. And you testified to that conversation between Mr. Fayerweather and yourself on that forenoon about the $100,000 in bonds for Mrs. Beardsley, did you not?

A. I believe I did.

F. 1187

Page 495.

Q. Did you testify before the Surrogate about any conversation between Mr. Fayerweather and yourself on the morning of November 15th, or during the forenoon of November 15th, or at any time on that day before the execution of the fourth codicil in regard to any institutions whatever?

A. I don't remembər if I did or not.

Q. You were examined by your own counsel, Mr. Parsons, before the Surrogate, were you not?

A. Yes, sir.

Q. Did you produce before the Surrogate this envelope having upon the back of it the pencil memoranda, and marked "Exhibit Oa"?

F. 1188 A. I don't remember if I did or not.

Q. Have you a recollection whether this envelope was produced there?

A. I don't remember.

Q. Have you no recollection as to whether you testified before the Surrogate to any conversation whatever with Mr. Fayerweather on the 15th of November, prior to the execution of the codicil in regard to any institutions?

A. I have no recollection.

Q. None whatever?

A. No.

Q. Has this envelope, "Exhibit Oa" been in your possession ever since the 15th of November, 1890?

A. That envelope was in the safe deposit vault of the Nassau Bank, and was taken out from the bank upon the receipt of one of the subpœnas as a witness in this case.

Page 496.

Q. Was that the first time that it had been out?

A. Oh, no; that is the last time it was taken out.

Q. You had it in your possession at the time of
F. 1189 the hearing before the Surrogate, hadn't you?

A. I am not sure of that, whether I had or not.

Q. Who did have it if you did not?

A. I may have had it, but I am not sure.

Q. Had you given it to anybody else at any time since the 15th of November, 1890?

A. I gave the letter that was in it to Mr. Parsons, but whether I showed him the envelope at the time I do not know.

Q. It was not produced and exhibited to anybody before the Surrogate?

A. I don't remember whether it was or not.

Q. You have no recollection about it?

A. No, sir.

Q. You have no recollection that it was produced?

A. No, sir.

F. 1190 Q. And you have no recollection that you ever testified before the Surrogate upon the subject of any conversation with Mr. Fayerweather on the 15th of November before the execution of the fourth codicil in regard to institutions?

A. I have no recollection; but I don't mean to say that I did not so testify.

Q. Had you any reason for not testifying before the Surrogate in regard to any conversation between Mr. Fayerweather and yourself about institutions on the forenoon of November 15, 1890?

A. I had no reason.

Page 497.

Q. This letter of November 15, signed by Mr. Fayerweather and addressed to Messrs. H. B. Vaughan and Mr. F. B. Myrick, and marked "Exhibit W", says: "In addition to the sums already disposed of by you, I wish you would give a further sum of about $100,000, &c." What sums were referred to by that expression, "in addition to the sums already disposed of by you?

Objected to by Mr. Parsons as immaterial and irrelevant. Objection overruled. Exception.

F. 1191 A. They refer to sums that were disposed of by Mr. F. B. Myrick and H. B. Vaughan.

Page 500.

Q. Now when was it that you read that draft and the codicil?

A. I can't answer that; I can't remember when.

Q. Wasn't it between the time you got it from Mr. Butler's house on the morning of the 11th, and the time that you left it at the house to be engrossed?

A. I can't say that. I may have read it with Mr. Butler.

Q. Did you read it more than once? A. I can't answer that question.

Q. How is that?

A. I cannot answer that question.

F. 1192 Q. Now, won't you state to me the contents of that codicil or the draft of the codicil as you read it?

A. I cannot.

Q. State what you can of it?

A. It took the residuary estate from Mr. Bulkley and Mr. Ritch.

Q. And what did it do with it?

A. And my recollection is that it restored it to the status it was before it was conveyed to them.

Q. That is to the status before the first codicil was executed?

A. I cannot answer that, but I think it restored it to the status before it was conveyed to them.

Q. You mean before it was willed to them?

A. Willed to them, yes, sir.

Q. Now, were there any other provisions in that codicil except the changing of the residuary estate from the bequest to Ritch and Bulkley, back to its former status?

A. I do not remember.

Q. Will you testify that there were not?

A. I cannot remember.

F. 1193 Page 501.

Q. Was there not a provision in that codicil for Miss Anner Amelia Joyce?

A. Not that I remember.

Q. Was there not a provision in that codicil for Mrs. Fayerweather?

A. Not that I remember.

Q. Was there not a provision in that codicil for Mrs. Achter?

A. Not that I remember.

Q. Or for Mrs. Emma S. Drury, or Fayerweather?

A. Not that I remember.

Q. Or for Miss Lucy Beardsley?

A. Not that I remember.

Q. Or Morris B. Beardsley?

F. 1194 A. Not that I remember.

Q. Or their children?

A. Not that I remember.

Q. Was there not a provision in that codicil for Dr. Lloyd, the clergyman?

A. No.

Q. You do remember that?

A. Yes.

Page 502

Q. What time in the day on Tuesday was it executed?

A. Excuse me one moment, Mr. James. My impression is that that will and the draft were all in an envelope together, and my impression is that I never took them out of the envelope afterwards.

Page 514

Q. After the death of Mr. Fayerweather did not you at all times maintain and insist that the devises and bequests of Mr. Fayerweather to yourself and Ritch and Bulkley of his residuary estate were absolute?

A. Yes, sir.

Q. Did you not always, since Mr. Fayer-
F. 1195 weather's death, deny that there was any trust of the residue?

A. Yes.

Page 516.

Q. In the codicil of November 11th, that was destroyed, was there any reference to Lincoln or Hampton Universities, as far as you know?

A. I do not recall.

Q. Did that codicil contain anything, so far as you recollect, except the provision to restore the will, or the provision of the residuary estate as it was mentioned in the will?

A. That is all I recollect.

xxx Q. I think you did state, in answer to Colonel James, that you had never to your recollection
F. 1196 seen either Mrs. Achter or Mrs. Drury, later Mrs. Emma S. Fayerweather?

A. Never.

Exhibit 97

EXTRACT FROM HALEY FISKE'S TESTIMONY BEFORE JUSTICE TRUAX.

F. 1197

Page 426.

Q. What is the fact, as to whether on the 25th of February, 1891, the deed of gift was produced before the Surrogate in the contest, exhibited and marked for identification?

xxx A. That is the fact.

Page 441.

xxx Q. The drafting of that deed of gift?

A. Why, I think Mr. Parsons. That is, if you mean to say he took the principal part in dictating the draft.

F. 1198

Page 442.

Q. What I want to know is, how many of these institutions were the nominees of each of these three executors,—that is did one executor nominate certain institutions, and another executor other certain institutions?

Page 443.

Mr. Arnoux: We object to that as immaterial, irrelevant and incompetent, and on the ground that the executors had nothing whatever to do with it; it was done by the residuary legatees.

Q. Where was the deed of gift executed, in whose office?

A. Mr. Parsons' office.

Exhibit 98.

EXTRACT FROM PRESCOTT HALL BUTLER'S TESTIMONY BEFORE JUSTICE TRUAX.

Page 396.

Q. Please state what you read?

A. It was a clause at the foot of the paper which I read, and was as follows, according to by best recollection: "Signed, sealed, published and declared by the above named testator, Daniel B. Fayerweather, as and for a codicil to his last will and testament, in our presence, and we thereupon at his request and in his pre-
F. 1199 sence, and in the presence of each other, have hereunto subscribed our names as witnesses."

Q. As a matter of fact, at that time, did Mr. Fayerweather subscribe that paper?

xxxxxx A. He did, yes.

Q. And as matter of fact, did the other persons who were present do what the clause which you have recited declared that they did—that is, subscribe it in his presence as witnesses?

A. They did; yes, at the foot of the clause.

Exhibit 99.

EXTRACTS FROM JUSTUS L. BULKLEY'S TESTIMONY BEFORE JUSTICE TRUAX.

F. 1200 Page 675.

Q. Did you ever inform Mrs. Lucy Fayerweather, the widow of Daniel B. Fayerweather, or Mrs. Mary W. Achter, or Mrs. Emma S. Fayerweather, or anyone reprerenting them, at any time since the death of Daniel B. Fayerweather, that you and Ritch and Vaughan held the residuary estate of Daniel B. Fayerweather, upon any trust?

A. No.

Q. Did you ever inform either of those three persons named that they were entitled to any interest in that estate beyond the specific legacies and the annuity made for the widow.

A. Why, no; I never met them except I met Mrs. Fayerweather at the day of the funeral.

Page 676

Q. You answer no; you never informed them?

A. No.

Q. Or did you inform anybody representing them?

A. That I held this under a secret trust?

Q. No; that they had any interest in the estate, except the specific legacies and the annuity for the widow?

A. It was known to all men, you might say, that under the deed of gift they had a further interest.

Q. I am not speaking of the deed of gift.

F. 1201 Did you ever inform them that you held it upon a secret trust?

A. No, sir.

Q. Throughout the proceedings in the Surrogate's Court did you not deny that you held it upon any trust; you or your representative there in court?

A. It was so held by the executors of course, that they did not hold it under a secret trust; the whole contest, as I understand it, was that we did not hold it under a secret trust.

Q. That was your position?

A. Yes.

Q. And the lawyers representing you?

A. So I understood.

Q. Throughout the whole contest?

A. Yes.

F. 1202 Q. And ever since?

Page 678—679

Mr. Root: That is to say, I undertook to show by Mr. Vaughan that this envelope on which he made pencil memoranda was not produced before the Surrogate. He could not remember it.

I think it is only fair, if we are to take this short way of identifying papers that were produced, that the other facts about which there is no dispute at all should be conceded.

Mr. Parsons: We admit that that was not put in evidence before the Surrogate.

Mr. Root: That is the envelope marked "Oa," upon which Mr. Vaughan's pencil memoranda are?

Mr. Parsons: Yes.

Page 680

Q. Did you meet Mr. Ritch by appointment on the day of Mr. Fayerweather's death?

A. No, sir; I presume he was on his way uptown or out in the country.

F. 1203 Q. You met him casually?

A. He dropped in my office.

Q. Where was your office?

A. 76, Gold Street.

Q. Mr. Ritch came into your office?

A. He came into my office.

Q. About what time?

A. Late in the afternoon; I could not fix the time; about the time a person would naturally go home.

Exhibit No. 100.

OPINION OF LACOMBE, J., AS TO ABRIDGING RECORD.

F. 1204

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FAYERWEATHER WILL CAUSES.

Lacombe, J.

As indicated on the argument the Examiner will take the record and go carefully through it to eliminate all disputes and discussions as to adjournments or other side

issues, or harangues of counsel and all superfluous verbiage in the statement of objections.

A. Single plea may be printed with statement indicating in what respect as to names, dates, etc., other similar pleas differ from it.

The printed books in Amherst College case and in Probate case may be used without reprinting as indicated on the argument.

And the record shall be printed in the form required by rule of U. S. Supreme Court.

The motion to strike out examination of clerk in Surrogates' office as to search for lost codicil is
F. 1205 denied.

Motion against Amherst and Williams for judgment *Pro confesso* are denied.

Motions to set aside service of process are denied and the plaintiff in the cross-bill may take order in each case directing service *nunc pro tunc* on the individuals who have been served.

The time of these colleges to plead, answer, etc., is extended until next ensuing Rule day.

F. 1206

Exhibit No. 101.

OPINION OF LACOMBE J. ALLOWING TESTIMONY FOR BILL TO BE USED FOR CROSS BILL.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

F. 1207

JOHN B. REYNOLDS, Executor, &c.
vs.
THOMAS G. RITCH, Executor, and others.

1. The motion to require defendants to appear, demur, plead or answer to the cross-bill is denied.

2. The motion that this cause be heard with the principle cause instituted in the original bill by Emma S. Fayerweather and others is denied, with leave to renew when this cause is actually ready for hearing.

F. 1208 3. The motion that the testimony taken by the complainant under the replication to the plea and answer of Trustees of Hamilton College to said original bill stand and be read and received with the same force and effect as if the same had been taken in support of the cross-bill,—is granted.

4. The motion to stay proceedings is denied.

April 3, 1899.

Exhibit No, 102.

MEMORANDUM OF LACOMBE J., AS TO PROOF.

UNITED STATES CIRCUIT COURT.

By LACOMBE J, August 1st., 1900.

MATTER OF FAYERWEATHER CASES.

F. 1209

Order for decree is signed upon plea of Hamilton College to the original bill. The Court supposed that the proofs were taken upon plea to the cross-bill, as well as upon plea to original bill; but complainants have presented an order giving them leave to reply apparently on the assumption that no proofs have been taken. What is the facts as to this? As to the other defendants, if they have decided not to put themselves in the position of Hamilton College by conforming their pleas to its and stipulating the same testimony in they should serve proposed orders for settlement.

See Fayerweather vs. Trustees &c. Hamilton College.

Filed July 30, 1900.

F. 1210

Exhibit No. 103.

MEMORANDUM OF LACOMBE J, AS TO ORDERS.

FAYERWEATHER WILL CASES.

Orders have been signed in the following cases, Hamilton College, Ritch, Bulkley & Vaughan, individually and as executors and trustees.

On the next motion day, August 31st, the Court will expect orders in all the other cases to be presented for signatures and each will then be considered and signed separately as it seems impossible to get all to unite in taking the same position as that passed upon in Hamilton College case.

Filed Aug. 22, 1900.

Exhibit No. 104.

F. 1211

OPINION OF LACOMBE, J., (OF DEC. 27th, 1900), AS TO ANSWERING CERTAIN QUSTIONS.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FAYERWEATHER
vs.
RITCH.

F. 1212

REYNOLDS
vs.
RITCH.

MOTION TO PUNISH WITNESS FOR CONTEMPT IN FAILING TO ANSWER CERTAIN QUESTIONS, FAILING TO PRODUCE CERTAIN PAPERS, AND LEAVING THE STAND WHILE UNDER EXAMINATION.

Lacombe, *Circuit Judge.*

The following rulings are made as to the questions:

Q. 44 and 45 witness must answer.
Q. 48 and 49 witness must answer.
Q. 51, 52, 53, witness must answer.
Q. 54, 55 witness must answer.
Q. 60 witness must answer.
Q. 66 witness must answer.
Q. 67 witness must answer.
Q. 74 witness must answer.
Q. 75 witness need not answer.
Q. 76 witness need not answer.

F. 1213

Whether or not he is willing to waive any claim that communications between his predecessor and her counsel are privileged is a matter he or his counsel will decide whether evidence of such communications is offered.

Q. 77 witness must answer.
Q. 78 witness must answer.
Q. 79 witness must answer.

As to the letters to Mrs. Fayerweather from her counsel giving advice or stating facts relevant to the matter in which they were retained the same are privileged; witness, however, must bring the papers into
F. 1214 Court if he has them or can control them and this Court will then decide as to any which may be submitted whether they are or are not covered by the privilege; the defendants should not be left to the witness' determination of that question. If witness complies with those instructions the motion to punish him for contempt will be denied; otherwise he will be committed to the custody of the marshal until he does so comply.

Filed Dec. 27th, 1900.

Exhibit No. 105.

OPINION OF LACOMBE J. AS TO READING IN HAMILTON EVIDENCE.

UNITED STATES CIRCUIT COURT.

F. 1215

SOUTHERN DISTRICT OF NEW YORK.

FAYERWEATHER
vs.
RITCH.

Lacombe, *Circuit Judge.*

The testimony of any witness taken under the plea of Hamilton College may be read in evidence, opportunity being given for objection and exception by any and every party against whom it is read.

And the party reading such testimony must produce the witness for cross-examination.

F. 1216

Filed Jan. 30, 1901

Exhibit 106.

OPINION OF LACOMBE J, AS TO ADMISSION OF TESTIMONY.

UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF NEW YORK.

F. 1217

FAYERWEATHER
vs.
RITCH, et al.

Motion to require Witnesses to answer Questions.

Lacombe, *Circuit Judge.*

The points raised here have already been considered and in this very case, when testimony was being taken under the plea of Hamilton College. While myself of the opinion that the evidence sought to be elicited by the questions is irrelevant to the issues raised
F. 1218 by the plea of res adjudicata the Supreme Court rule as interpreted in Blease *v.* Garlington 92 United States requires the answer to be preserved, so that in the event of the Appellate tribunal reaching a different conclusion as to relevance there may be no necessity of sending the suit back for their testimony.

The objection that questions 102, 108 and 109 put to the witness Myrick are irrelevant to the issues are therefore reserved for his position at final hearing, and the examiner will take down the answers subject to such objections. If the witness claims some privilege and declines to answer, application may be made to punsih him

for contempt; upon which he may be heard in support of his alleged privilege.

If his contention be an arguable one, even though it does not convince this Court, opportunity to renew may be given as in the case of Mr. Butler's claim of privilege which was theretofore raised in this point.

As to the witness Vaughan a similar disposition will be made. He should answer Q. 3, 8, 9, 10. When those are answered an intelligent ruling can be made on Q. 2.

F. 1219

Exhibit No. 107.

OPINION OF LACOMBE J, AS TO JUSTICE TRUAX'S TESTIMONY; AND AS TO READING IN EVIDENCE.

UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF NEW YORK.

F. 1220

EMMA S. FAYERWEATHER AND ANO.,
vs.
TRUSTEES OF HAMILTON COLLEGE, Impleaded.

MOTION TO OPEN DECREE FOR FURTHER PROOF.

Lacombe, *Circuit Judge.*

The evidence of Judge Truax is relevant, but no sufficient excuse is presented for not offering it before. The

other evidence is all irrelevant to the issues raised by the plea. It is true that there is much similar evidence now in the record, but that is because this Court under Blease *v.* Garlington had no power to exclude it. Here motion being made to the Court's discretion, it will not add to this, too voluminous record, any more evidence not properly admissible, under bill and plea: motion denied.

Filed August 12th, 1901.

Exhibit No. 108.

F. 1221

OPINION OF LACOMBE, J., THAT DEFENDANTS' TESTIMONY CLOSE.

SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYEEWEATHER, *et al.*
vs.
THOMAS G. RITCH, *et al.*
JOHN B. REYNOLDS, *et al.*
F. 1222 *vs.*
THOMAS G. RITCH, *et al.*

Lacombe, *Circuit Judge.*

The time for any and for all the defendants to complete their proofs under any of the issues raised by their respective pleadings is limited to May 15, 1902.

If for any reason it is supposed that some particular piece of testimony should be received at a later day, that proposition may be presented as a separate motion on papers showing what the testimony is and why it should be thus received.

April 5, 1902.

Exhibit 109.

ORDER FOR SERVICE UPON NON-RESIDENT CORPORATIONS.

At a stated Term of the United States Circuit Court for the Southern District of New York, held at the Post Office Building in the City of New York upon the 19th day of August, 1897.

F. 1223

Present:—Honorable E. Henry Lacombe, Circuit Judge.

Emma S. Fayerweather and another; Complainants *against* Thomas G. Ritch, &c., and others; Defendants.	**In Equity.**

Upon the annexed affidavit of Roger M. Sherman, and upon the bill of complaint and appearances herein and on motion of Roger M. Sherman, Esq., Solicitor, for Complainants, it is

F. 1224

ORDERED, That personal service of an alias subpœna herein be served by any person of full age upon the corporations defendant hereinafter named, or upon an officer or trustee of such corporation, wherever found, be made and that such defendants appear, plead, answer or demur to the bill of complaint herein by the first day of October, 1897, and that a copy of the order be served with said subpœna, said defendants being those following to wit:

The Trustees of Amherst College, at Amherst, Mass., the Trustees of Dartmouth College, at Hanover, N. H.,

the Trustees of Hamilton College at Clinton, N. Y., the University of Rochester, at Rochester, N. Y., the President and Trustees of Williams College, at Williamstown, Mass., Cornell University, at Ithaca, N. Y., Lincoln University, at Lower Oxford, Pennsylvania.

The Rector and Visitors of the University of Virginia at Charlottesville, Va., the Hampton Normal and Agricultural Institution at Hampton, Va., the Adelbert College of the Western Reserve University, at Cleveland, Ohio, Park College at Parkville, Mo., Lucy J. Beardsley, at Bridgeport, Conn., North Western University, at Evanston, Ills., Haverford College at Haverford
F. 1225 College Post Office, Montgomery, County, Pa., the University of Pennsylvania, at Philadelphia, the Brown University at Providence, R. I., the College of New Jersey at Princeton, N. J., Wells College at Aurora, N. Y., Rutgers' College at New Brunswick, N. J., the Shattuck School, at Faribault, Minn., Maryville College at Maryville, Tenn., Wabash College at Crawfordsville, Ind., Marietta College at Marietta, Ohio, the President and Fellows of Yale College in New Haven, Conn., at New Haven, Conn.

E. Henry Lacombe,

U. S. Circuit Judge.

F. 1226

Exhibit 110.

ORDER SETTING ASIDE SERVICE OF SUBPŒNA ON LINCOLN UNIVERSITY.

At a stated term of the United States Circuit Court for the Southern District of New York, held
F. 1227 at the Federal Building, in New York City on the 7th day of September, 1898.

Present:—Honorable E. HENRY LACOMBE, Circuit Judge.

EMMA S. FAYERWEATHER and Another
against
THOMAS G. RITCH and Others, LINCOLN UNIVERSITY Impleaded.

A motion having been heretofore made by the defendant, Lincoln University, to set aside the service of the subpœna upon it herein, and to dismiss the action as to it herein, and the motion coming on to be heard,

F. 1228

NOW, on reading and filing the order to show cause and the affidavit of Howard A. Taylor, thereto attached, on which said motion was heard and on reading the amended bill of complaint already filed herein, and after hearing Howard A. Taylor, of counsel for the Lincoln University, in support of the motion, and Roger M. Sherman, of counsel for the complainants, in opposition thereto, it is, on motion of Hornblower, Byrne, Taylor & Miller, Solicitors for the defendant Lincoln University, appearing specially for the purpose of this motion only,

ORDERED, That the motion be and the same hereby is granted and that the service of the subpœna herein upon the defendant Lincoln University be and the same hereby is set aside and the action dismissed as to the defendant Lincoln University.

(Signed),

E. HENRY LACOMBE,

U. S. C. J.

Exhibit 111.

ORDER OF LACOMBE, J., AS TO ONE RETURN.

F. 1229

At a stated Term of the United States Circuit Court for the Suthern District of New York held at the United States Circuit Court and Post Office Buildings in the City of New York, on the 31st day of October, 1898.

Present:—Honorable E. Henry Lacombe, Judge,

EMMA S. FAYERWEATHER and another, Complainants
against
THOMAS G. RITCH, *et al*
Defendants.

F. 1230

Upon reading and filing the affidavits of William C. Wallace, verified, October 22nd, 1898, and the notice of motion thereto attached, and upon hearing William C. Wallace in favour of the motion and Mr. William Blaikie in opposition thereto, it is

ORDERED, That the clerk of this Court make up but one return to the United States Circuit Court of Appeals for all of the parties appealing from the Order entered herein granting the injunction, and print but one record for all of the parties appealing.

E. HENRY LACOMBE, U. S. Circuit Judge.

Exhibit 112.

ORDER THAT HAMILTON TESTIMONY BE READ AS TO CROSS BILL.

At a stated term of the U. S. Circuit Court, for the Southern District of New York held at the General Post Office Building in the City of
F. 1231 New York upon the 5th. day of April 1899.
Present Honorable E. Henry Lacombe, *Circuit Judge.*

JOHN B. REYNOLDS, as Sole Executor of the estate of LUCY FAYERWEATHER, Complainant,

against

THOMAS G. RITCH, &c. and others, defendants.

F. 1232

The motion coming on duly to be heard upon an order to show cause dated March 14th, 1898 and the proceeding therein recited: and upon motion of William Blaikie of counsel for the complainant herein, and Roger M. Sherman, Esq., of counsel for the defendants Emma S. Fayerweather and Mary W. Achter in support of the motion; Messrs. Putney & Bishop of counsel for the Trustees of Amherst College and other defendants; Messrs. Root, Howard, Winthrop & Stimson of counsel for the Trustees of Hamilton College; Messrs. Ritch, Woodford, Bovee & Wallace of counsel for Thomas G.

Ritch individually &c.; and for other defendants: Messrs. Parsons, Shepard & Ogden of counsel for Bulkley & Vaughan, and Messrs. Swayne & Swayne of counsel for the Lafayette College defendant in opposition thereto: and upon the affidavit of service of Joseph Laux upon the defendants and on the defendants therein named and upon admission of service of said order upon the other defendants.

It is ordered that the motion so far as it seeks to require the defendants to appear, demur, plead or answer to the cross bill, and to stay proceedings in the original cause be and the same is hereby denied.

F. 1233 That the motion that this cause be heard with the principal cause instituted in the original bill of Emma S. Fayerweather and another be and the same hereby is denied, with the leave to renew when this cause is actually ready for hearing.

That the motion so far as it asks that the testimony taken by complainants under the replication to the plea and answer of the Trustees of Hamilton College to said original bill stand and be read and received with the same force and effect as if the same had been taken in support of the cross bill, be, and the same hereby is granted.

E. Henry Lacombe,
U. S. C. J.

F. 1234

Exhibit 113.

ORDER DISPENSING WITH PRINTING OF TRUAX CASE.

CIRCUIT COURT OF THE UNITED STATES.

F. 1235 SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and another, Complainants,
against
THOMAS G. RITCH and others, Defendants.
In Equity.

On the annexed affidavit of Sherman M. Granger, verified May 15th, 1899, it is

F. 1236

ORDERED, That the printing of the printed Case on Appeal to the New York State Court of Appeals in the case of The Trustees of Amherst College and others against Ritch and others, by this defendant The Trustees of Hamilton College, as part of the proofs of the said defendant in the issues joined on the plea and replication thereto in the above entitled proceeding, and the service of any copies of said printed Case on Appeal to the New York State Court of Appeals, upon the solicitors for the complainants, shall be dispensed with; and it is further

ORDERED, That if the defendant The Trustees of Hamilton College submit to this Court one copy of said printed Case on Appeal to the New York State Court of Appeals shall be a part of the proofs of the said defendant in the said issues, as though the same had been printed and served by said defendant with the other parts of the proofs of the said defendants.

Dated May 15th, 1899.

E. HENRY LACOMBE,
U. S. C. J.

F. 1237

Exhibit 114.

ORDER SETTING ASIDE SERVICE OF SUBPŒNA ON PARK COLLEGE.

At a stated term of the United States Circuit Court for the Southern District of New York held at the Federal Building in New York City on the 31st day of May, 1899.

Present: Hon. E. Henry Lacombe, Circuit Judge.

EMMM S. FAYERWEATHER and F. 1238 another Complainants
against
THOMAS G. RITCH and others, Park College, impleaded, Defendants.

A motion having been heretofore made by the defendant Park College to set aside the service of the subpœna

upon it herein and to dismiss the action as to it herein, and the motion coming on to be heard.

Now, on reading and filing the order to show cause and the affidavit of Clark Brooks thereto attached on which such motion was heard, and on reading the amended bill of complaint filed herein and after hearing Clark Brooks solicitor for Park College, in support of the motion and Roger M. Sherman, of counsel for the Complainants, in opposition thereto, it is, on motion of said Clark Brooks, appearing specially for the purpose, of this motion.

ORDERED that the said motion be and the
F. 1239 same hereby is granted and that the service of the subpœna herein upon the defendant Park College be and the same hereby is set aside and the action dismissed as to the defendant Park College, on the ground of the non-residence of said defendant.

(Signed.)

E. Henry Lacombe,

U. S. Circuit Judge.

F. 1240

Exhibit 115.

ORDER AMENDING BILL OF COMPLAINT.

At a stated Term of the U. S. Circuit Court for the Southern District of New York, held at the Federal Building in the City of New York and Burough of Manhattan, July 1st, 1899.

F. 1241 *Present:*—Honorable E. HENRY LACOMBE, Circuit Judge.

EMMA S. FAYERWEATHER and another, Complainants

against

THOMAS G. RITCH, individually and others, Defendants.

F. 1242

A motion coming on to be heard upon the affidavit of Roger M. Sherman, verified herein on June 6th, 1899, and upon due notice thereof; and the proceedings therein recited; and upon motion of Roger M. Sherman, Esq., of counsel for complainants herein; and upon filing proof of due service, copies of said affidavit and notice upon the following named defendants, to wit: Upon Adelbert College of Western Reserve University, upon the University of the City of New York, upon Union College, in the town of Schenectady in the State of New York, upon the Trustees of Amherst College, and President and Trustees of Wil-

liams College, Cornell University, Marietta College, the Trustees of Hamilton College, Trinity College, Union Theological Seminary, Wesleyan University, Rutgers College, The President and Fellows of Harvard University, The Presbyterian Hospital in the City of of New York, Brown University, Lafayette College at Easton, Pa., Manhattan Eye and Ear Hospital, Vassar College, the Trustees of Bowdoin College, Wright Memorial Hospital, the Cooper Union, Dartmouth College, North Western University, Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, individually and as Executors and Trustees of the last Will
F. 1243 and Codicils of Daniel B. Fayerweather, deceased, defendants herein, and upon the Trustees of Columbia College in the City of New York, and the President and Fellows of Yale College, at New Haven, Conn., and upon St. Luke's Hospital, in said City of New Ysrk, defendants herein;

And after hearing Roger M. Sherman, for complainants in support of said motion; James L. Bishop, of counsel for Amherst and Williams Colleges, C. N. Bovee, as counsel for Ritch, Cornell University and Marietta College, Messrs. Scott & Upson, as counsel for Adelbert College, and Messrs. Root, Howard, Winthrop & Stimson, as counsel for the Trustees of Hamilton College, defendants herein, in opposition thereto;

F. 1244 *IT IS ORDERED* that the original Bill of Complaint be amended thus, viz.:

By inserting in the prayer for relief thereof, after the word "charge and allege that" upon page 22 (Complainants' Pleadings, &c., for final hearing, &c.)

"The decrees of the Surrogates of the County of New York whereby said testamentary papers were admitted to probate, are, and each of them is fraudulent, null and void, and should be set aside, and

altogether held for naught; and that they should be relieved therefrom and restored to all that they have lost by reason thereof; and that your Honor should in lieu thereof, establish and compel due performance of the true and lawful last will and testament of said Daniel B. Fayerweather, or, in lieu of any such, compel the payment and distribution of the estate of said Daniel B. Fayerweather, according to law;

And complainants further charge and allege that the said"

II.—By inserting the word "not" after the word "was" at page 8, folio 24 of said bill.

F. 1245 III.—By striking out the word "but" in folio 25, and inserting in its place "and".

IV.—That all parties defendant may have twenty days after service of this order to plead, answer or demur herein.

V.—That any plea or demurrer so interposed will be considered as a first dilatory pleading, and, in the event of its being overruled, the party interposing it will be allowed to answer.

That the defendant The Trustees of Hamilton College, have twenty days to elect whether they will plead, answer or demur to said amended bill; or whether they will stand upon their present plea and upon the

F. 1246 evidence already taken upon the issues raised upon their present plea and replication thereto and submission thereof heretofore in this Court.

(Signed) E. HENRY LACOMBE,
U. S. C. J.

No objection to form of above order.

(Signed) ROOT, HOWARD, WINTHROP & STIMSON,
Solicitors for Hamilton College.

SIRS:—Please take notice that above is a copy of an order amending the bill of complaint, &c., in the within named action this day entered in the office of the Clerk

of the United States Circuit Court for the Southern District of New York at the Borough of Manhattan and City of New York, July 14th, 1899.

Yours, &c.

ROGER M. SHERMAN,
Solicitor for Complainants,
150 Nassau Street,
New York.

Exhibit 116.

ORDER SUSTAINING HAMILTON'S PLEA TO AMENDED BILL.

F. 1247

At a stated term of the Circuit Court of the United States for the Southern District of New York, held in the U. S. Post Office Building, upon the 23d day of July, 1900, at 10:30 a.m.

Present: Hon. E. Henry Lacombe, Circuit Judge.

EMMA S. FAYERWEATHER and MARY W. ACHTER, Complainants,

F. 1248 *against*

THE TRUSTEES OF HAMILTON COLLEGE, impleaded, Defendants.

This cause coming on for hearing upon pleadings and proof as between complainant and the Trustees of Hamilton College defendants, now after hearing Roger M. Sherman, Esq., of counsel for complainants, and Hon. Elihu Root, counsel for said defendant.

It is Ordered, that the plea of the Trustees of Hamilton College to the amended Bill of Complaint be and the same hereby is sustained.

It is furthered Ordered that a final decree be entered accordingly.

E. HENRY LACOMBE,
U. S. Circuit Judge.

Exhibit 117.

ORDER SUSTAINING PLEAS OF EXECUTORS TO AMENDED BILL.

F. 1249

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, held in the U. S. Post Office Building, upon the 23rd day of July, 1900, at 10.30 a.m.

Present: Honorable E. HENRY LACOMBE, Circuit Judge.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Complainants,

F. 1250 *against*

THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN, individually and as executors and trustees of the Will and Codicils of Daniel B. Fayerweather, deceased,
Defendants.

Original Bill

No. 6675.

This cause coming on to be heard upon exceptions to the pleas of the above named defendants to the

Amended Bill, after hearing Roger M. Sherman, Esq., of counsel for complainants, in support of the exceptions, and John E. Parsons, Esq., and Messrs. Ritch, Woodford, Bovee and Wallace, in support of the pleas, it is

ORDERED, That said exceptions be, and they are hereby overruled, and said pleas sustained.

That the complainants have leave to file a replication to said pleas on or before the September Rule day; and that, upon default of such replication, the amended bill be dismissed as to said defendants.

(Signed) E. HENRY LACOMBE,
U. S. Circuit Judge.

F. 1251 Filed August 22nd, 1900.

Exhibit 118.

MEMORANDUM AS TO SIMILAR ORDERS AND REPLICATIONS.

Replications were duly filed thereunder. A similar order was made sustaining the pleas of said three Executors to the cross-bill of defendant Reynolds, as Executor &c, and replications were duly filed
F. 1252 thereunder.

A similar order to the above of July 23rd, 1900, as to said 3 Executors was also made sustaining the pleas of defendants the Presbyterian Hospital, Wesleyan University, Cornell University, Marietta College, Yale University, St. Luke's Hospital and Dartmouth College, both to the amended bill and to Reynolds cross bill and allowing replications thereto, which were duly filed.

Exhibit 119.

ORDER SUSTAINING EXCEPTIONS TO PLEA OF AMHERST COLLEGE.

At a stated Term of the Circuit Court of the United States for the Southern District of New York, held at the United States Court rooms in the City of New York on the 31st day of August, 1900.

F. 1253

Present:—Honorable E. HENRY LACOMBE, Circuit Judge.

EMMA S. FAYERWEATHER and another,
Complainants,
against
THOMAS G. RITCH and others,
F. 1254 Defendants.

Exceptions having been filed by the complainants to the plea filed herein by the defendant Trustees of Amherst College to the amended bill of complaint, exceptions having come on for hearing. Now, after hearing Mr. Roger M. Sherman for the complainants and Mr. James L. Bishop on behalf of the Trustees of Amherst College.

IT IS ORDERED, That the exceptions to said plea be and the same are hereby sustained upon the ground that the same is bad for duplicity, in that it sets up two pleas in bar, and said plea is hereby overruled, with leave to the said defendant to file an amended plea in the form of the plea heretofore filed by the defendant Hamilton College to the amended bill of complaint and that said plea so filed be considered as a first dilatory pleading, and in the event of its being overruled, the party interposing it will be allowed to answer.

IT IS FURTHER ORDERED, That upon filing such amended plea, the record taken upon the F. 1255 replication to the plea of Hamilton College to the amended bill shall be taken as and for the record under the issues thus raised.

E. HENRY LACOMBE,
U. S. C. J.

Similar orders were made at about the same time as to defendants Williams College and Union Theological Seminary.

F. 1256

Exhibit 120.

ORDER DISMISSING AMENDED BILL AS TO HAMILTON COLLEGE.

At a stated term of the Circuit Court for the Southern District of New York, held in the United States Post Office Building upon the 14th day of January, 1901.

Present: Hon. E. HENRY LACOMBE, Circuit Judge.

F. 1257

EMMA S. FAYERWEATHER and MARY W. ACHTER, Complainants,

against

THE TRUSTEES OF HAMILTON COLLEGE impleaded, Defendants.

F. 1258

This cause having come on for hearing upon pleadings and proof as between complainants and the Trustees of Hamilton College, defendants, and having heard Roger M. Sherman, Esq., of counsel for complainants and Hon. Elihu Root, counsel for said defendant, and an order having been granted and filed thereon on the 30th day of July, 1900, in the office of the clerk of this Court, sustaining the plea of the defendant the Trustees of

Hamilton College and directing that a final decree be entered accordingly,

Now on motion of Root, Howard, Winthrop & Stimson, solicitors for the said defendant,

It is Ordered, adjudged and decreed that the plea of the defendant, the Trustees of Hamilton College to the amended complaint herein be and the same is hereby sustained, and the amended complaint herein as to the defendant, the Trustees of Hamilton College, be and the same is hereby dismissed.

E. HENRY LACOMBE,
U. S. Circuit Judge.

F. 1259

Exhibit 121.

ORDER OF LACOMBE J, OF JANUARY 30, 1901, AS TO HAMILTON'S PROOF.

UNITED STATES CIRCUIT COURT.

FOR THE SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER,
Complainant,
against
THOMAS G. RITCH, et al.,
F. 1260 Defendants.
JOHN B. REYNOLDS as Executor
Complainant,
against
THOMAS G. RITCH et al.,
Defendant.

An order to show cause having been made herein to show cause why the proofs taken herein under the replication

to the plea and answer of the Trustees of Hamilton College should not be read and received with the same force and effect as if the same had been taken against all the defendants herein, and the same having come on to be heard.

Now after hearing Roger M. Sherman, Esq., in support of said motion and Messrs. C. N. Bovee, Jr., James L. Bishop and Henry L. Stimson opposed, it is

ORDERED, that the testimony of any witness heretofore taken in behalf of the complainants under
F. 1261 the plea of Hamilton College in the case of Fayerweather and Ritch, above-named may be read in evidence under the pleas and answers of any of the parties in either of the above entitled suits now at issue, opportunity being given for objection and exception by any and every party against whom it is read, provided that the party reading such testimony shall produce upon the request for cross-examination the witness whose testimony is so offered.

IT IS FURTHER ORDERED, that the record of the proofs of the defendant the Trustees of Hamilton College as heretofore printed and submitted to this Court in the case of Fayerweather and others against Ritch and others may be submitted as proof by the said
F. 1262 defendant under its plea to the cross-bill of Reynolds as Executor in all respects as if the said proofs and record so printed had been taken in and made under the said plea:

IT IS FURTHER ORDERED that this said defendant the Trustees of Hamilton College, within ten days after the taking of proof by defendants Ritch, Bulkley & Vaughan is completed, serve notice upon the solicitor for the complainant J. B. Reynolds as Executor of its election to stand also upon the proof taken under the pleas of the defendants Ritch, Bulkley & Vaughan to the cross-bill of said Reynolds, and upon such election and notice may offer the record of said proof or any of them

as proof in support of ~~this~~ it plea to the said cross-bill of said Reynolds. In that case the complainants to have 30 days thereafter to take further proof if they so select.

Enter as of January 30th, 1901.

E. HENRY LACOMBE,
U. S. C. J.

I consent
ROGER M. SHERMAN,
Solicitor for Complainants.
WILLIAM BLAIKIE,
F. 1263 Solicitor for Complainants cross-bill.

Exhibit 122.

MEMORANDUM AS TO LAFAYETTE'S PLEA TO REYNOLDS CROSS BILL.

F. 1264

An order was made by Lacombe, J., March 6th, 1901, that defendant's Lafayette College, be deemed to have pleaded like Hamilton College to the Reynolds cross bill, and that a replication be deemed to have been duly filed thereto.

A similar order as to Lafayette's plea to the Amended Bill appears in the Appendix of Exhibits, pages 240-242.

Exhibit No. 123.

ORDER OF LACOMBE J., AS TO USING HAMILTON RECORD, AND AS TO BILL AND CROSS BILL BEING HEARD AT ONE TIME.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

F. 1265

EMMA S. FAYERWEATHER AND ANOTHER,
Complainants,

vs.

PRESIDENT and TRUSTEES of WILLIAMS COLLEGE; and the UNION THEOLOGICAL SEMINARY impleaded
Defendants.

F. 1266

Upon the annexed affidavit of James L. Bishop, verified the 5th day of April, 1901, and on the order and stipulation therein referred to, let the complainants show cause before me at a stated term of the United States Circuit Court, for the Southern District of New York, to be held at Post Office Building, City and County of New York, upon the 12th day of April, 1901, at 11 o'clock in the forenoon, or as soon thereafter as counsel can be heard why an order should not be made herein,

that upon final hearing of the above entitled cases that there be submitted to the Court but a single copy of the Hamilton College record, to which shall be annexed the printed copies of the orders of August 31st, 1900, and stipulations of October 5, 1900, made herein, and a copy of the order herein; and why the defendant should not be relieved of serving upon the complainants any other papers than the printed copies of said order and stipulations, and a copy of said order.

Service of this order on or before the 5th day of April, 1901, at 5.30 p. m., shall be sufficient.

F. 1267

E. H. LACOMBE,
United States Circuit Judge.

The above order to show cause was afterwards endorsed thus:

"The motion is granted with the substitute "two" for "a single"; and with the proviso that this shall not operate to interfere with hearing of the issues raised by the cross-bill and pleadings thereto, and proofs thereunder simultaneously with the issues raised upon the original bill.

E. H. LACOMBE,
United States Circuit Judge.

F. 1268

Exhibit 124.

ORDER ALLOWING CROSS-EXAMINATION OF EDWARD M. GROUT.

At a Stated Term of the United States Circuit Court for the Southern District of New York held at the Chambers thereof in the Federal Building in the Borough of Manhattan, County and State of New York upon the 6th day of May, 1901.

F. 1269

Present: Hon. E. HENRY LACOMBE, Circuit Judge.

EMMA S. FAYERWEATHER, and another,
Complainants,
against
THOMAS G. RITCH, &c., and others,
Defendants.

In Equity No. 6675

F. 1270

Application having been made, upon the proceedings before the Examiner, to require the production of the witness Edward M. Grout for cross-examination; now after hearing Roger M. Sherman of counsel for complainants for the motion, and Mr. David Butcher of counsel for defendants thereto;

It is Ordered that the application to require the defendants to produce said witness for cross-examination be and the same is hereby denied.

Leave, however, is hereby given to the complainants in the bill and cross-bill to cross-examine said Edward M. Grout herein with like force and effect as if he had been produced by defendants for cross-examination, upon complainants procuring his attendance before the Examiner by subpœna, upon two days' notice to counsel for defendants herein, the expense of taking his cross-examination to be borne by the complainants.

F. 1271

Exhibit 125.

UNITED STATES CIRCUIT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER, and another; Complainants,
against
THOMAS G. RITCH, &c., and others; Defendants.

F. 1272

JOHN B. REYNOLDS, as Sole Executor of the Estate of Lucy Fayerweather, deceased; Complainant,
against
THOMAS G. RITCH, &c., and others; Defendants.

In Equity No. 6675.

Emma S. Fayerweather, Plff.,
vs.
John E. Parsons and others, Dfts.

Mary W. Achter, Plff.,
vs.
John E. Parsons and others, Dfts.

Mary W. Achter, Plff.,
vs.
United Dressed Beef Co., of N. Y., Dfdt.

John B. Reynolds, as Exr., &c., Plff.,
vs.
John E. Parsons and others, Dfts.

F. 1273

Anner A. Reynolds, Plff.,
vs.
United Dressed Beef Co., of N. Y., Dfdt.

Please take notice that upon the 13th day of May, 1901, at 2:30 P. M., the deposition of Albion M. Dyer, a material and necessary witness herein on behalf of the complainants and of other material and necessary witnesses for complainants herein, will be taken pursuant to Section 863 of the U. S. Revised Statutes before Hon. Louis W. Marcus, Referee, Surrogate of Erie County, at his office in the City Hall in the City of Buffalo, N. Y., or some other officer authorized to take such depositions under said section. The taking of said depositions will continue from day to day until completed.

F. 1274

Said testimony will be taken by deposition because said witnesses live at a distance from the place of trial of said actions greater than one hundred miles.

Please appear and cross examine.

Dated New York, May 9th, 1901.

ROGER M. SHERMAN,
Solicitor for said Complainants,
150 Nassau Street,
New York.

WILLIAM BLAIKIE,
Solicitor for John B. Reynolds, as Exr.
of Last Will and Codicil of Lucy
Fayerweather, deceased,
35 Nassau Street,
New York.

To MESSRS. RITCH, WOODFORD, BOVEE & WALLACE,
Solicitors for Defendants Ritch, Marietta College, Cornell University and Manhattan Eye & Ear Hospital.

F. 1275

PARSONS, SHEPARD & OGDEN,
Solicitors for Defendants Bulkley & Vaughan.

A copy of the above notice was duly served upon the solicitors for all 23 defendants.

F. 1276

Exhibit 126.

ORDER OF LACOMBE, J., TO ABRIDGE RECORD.

At a ~~Stated~~ Special Term of the United States Circuit Court for the Southern District of New York held at the Post Office Building in the City of New York upon the 18th day of July, 1901.

Present:—Honorable E. HENRY LACOMBE, Circuit Judge.

F. 1277

EMMA S. FAYERWEATHER and another
against
THOMAS G. RITCH, and others
JOHN B. REYNOLDS, as Executor
against
THOMAS G. RITCH, and others.

In Equity No. 6675

F. 1278

A motion having come on duly to be heard upon the record, and upon the notice of motion, respecting the preparation of the record for final hearing and other matters:

Upon reading and filing the notice of motion and upon all the records and proceedings heretofore filed and had herein:

And after hearing Roger M. Sherman, Esq., of counsel for the complainants upon the original bill and of counsel for complainant upon the cross bill in support of the motion and after hearing C. N. Bovee and Mr. Stimson of counsel for the defendants in opposition, and

upon the affidavits and admissions of service of the notice of motion.

ORDERED, That John A. Shields, Esq., the Examiner herein, go through the record upon two days' notice of hearing by either party to the other, and eliminate all discussions as to adjournments or other side issues, all harangues of counsel, and all superfluous verbiage in the statement of objections, so that, when an objection once taken at length recurs, it shall be covered in the subsequent recurrence thereof by the brief statement "same objection," or equivalent short statement, to identify it; and not repeated and extended at length; that this direction shall apply not only to the record not yet printed for final hearing but also to the record taken upon the plea of Hamilton College to the bill of complaint.

F. 1279

And it is further *ORDERED* that, upon the printing of the record for final hearing, and for certification thereof upon any appeal which may be taken, either to the Circuit Court of Appeals or to the Supreme Court of the United States, and for the purpose of making a return to either of said Courts, a single pleading may be printed where more than one pleading of the same substantial form has been interposed, and that it shall suffice to indicate every repetition of such pleading by a statement indicating in what respects as to names, dates and other particulars each similar pleadings differs from the first,

F. 1280

And it is further *ORDERED*, that the entire record, and every part of it, may be printed in the type and form required by the Printing Rules of the U. S. Supreme Court as amended;

And it is further *ORDERED*, that the printed appeal in the so-called Five College case need not be printed at length, either for final hearing or for return either to the

Circuit Court of Appeals, or to the Supreme Court of the United States; but that one copy may be used upon final hearing and certified, attested, or identified in lieu thereof;

And that any parties may print for the record or the return so much of the record in said five college case as they may desire, for the convenience of the parties or the Court,

And it is futher *ORDERED*, that the printed record of the proceedings in the Surrogate's Court in the matter of the probate of the last will and testament of Daniel B. Fayerweather, being the same which has been
F. 1281 heretofore used upon taking depositions of witnesses herein, need not be printed for final hearing, or for the return thereof, but may be used, and certified, attested, or identified, for return to the Circuit Court of Appeals, or the Supreme Court of the United States, in like manner as ~~first~~ hereinbefore above provided concerning the record in the Five-College case; and that the parties may print so much thereof as they may desire to call to the attention of the Court. Particularly, in like manner, as ~~first~~ above provided, respecting the record in the Five-College case.

It is further ordered that there may be included in the appendix to the record all exhibits referred to in any of the pleadings or any of the testimony;
F. 1282 and it shall be sufficient for the purpose of said record and return to indicate at which place in any pleading or in any testimony, where reference is made to ~~any~~ such exhibit, the place in such appendix wherein such exhibit is to be found, sufficiently identifying the exhibit, and the place in the case where it is found; and that otherwise no exhibit need be printed for final hearing on any such return.

E. HENRY LACOMBE,
U. S. Circuit Court Judge.

Exhibit 127.

ORDER OF LACOMBE J., AS TO SERVICE UPON DEFENDANTS AMHERST AND WILLIAMS TO THE CROSS-BILL.

F. 1283

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, held in the Post Office Building in the City of New York on the day of July, 1901.

Present:—Honorable E. HENRY LACOMBE, Circuit Judge.

EMMA S. FAYERWEATHER and another F. 1284 *against* THOMAS G. RITCH and others. JOHN B. REYNOLDS, as Executor, *against* THOMAS G. RITCH and others.	**In Equity No. 6675.**

A motion herein coming on duly to be heard against the Trustees of Amherst College and Williams College, defendants to the cross-bill herein, for judgment *pro confesso*, upon notice of motion and affidavit, and upon the records and proceedings filed and had herein, and a cross motion coming on duly to be heard on behalf of

said defendants appearing specially for the purpose of such motion to set aside service of process upon trustees or officers of said defendants: after hearing Roger M. Sherman, Esq., of counsel for complainants in the cross-bill for the motion for judgment, and James L. Bishop, Esq., of counsel for said defendants, in opposition thereto and in support of said motions to set aside service, it is

ORDERED, That said motions and each of them be and the same hereby are denied. And it is
F. 1285 further

ORDERED That the service made upon the persons so served of the process under the cross-bill against said defendants be approved and that such service stand now as if the same had been prior thereto authorized by a special order *nunc pro tunc* as of the time of actual service, and that appearance of solicitors for said defendants to the original bill be taken as an appearance to the cross-bill, but that the exigency of such service be deemed to begin as of the time of the entry of this order, and that the said defendants demur, plead or answer to the cross-bill at or before the August Rule Day, 1901, and that in the lieu of such plea, demurrer or answer the complaintant in the cross-bill be at liberty to make such application for a decree *pro confesso* as he may be advised.
F. 1286 (Signed.) E. HENRY LACOMBE,
U. S. C. J.

JAMES L. BISHOP, ESQ.,
Solicitor for Defendant,
AMHERST COLLEGE,
135 Broadway,
New York City.

Exhibit 128.

ORDER OF LACOMBE J., THAT THE TESTIMONY OF THOMAS MARSAC STAND.

At a Stated Term of the Circuit Court of the United States for the Southern District of New
F. 1287 York, held in the Post Office Building in the City of New York on the day of July, 1901.

Present: — Honorable E. HENRY LACOMBE, Circuit Judge.

EMMA S. FAYERWEATHER and another,
against
THOMAS G. RITCH and another.
JOHN B. REYNOLDS, as Executor,
F. 1288 *against*
THOMAS G. RITCH and others.

In Equity No. 6675.

A certificate from the Examiner herein upon the application of the defendants during the taking of the testimony on behalf of the complainants coming on duly to be heard, upon which the defendants moved to strike out the examination of the clerk in the Surrogates office

as to a search for a lost codicil, and to strike out evidence concerning the pendency of a motion to strike out the plea of the defendant Thomas G. Ritch, coming on duly to be heard, after hearing C. N. Bovee, Esq., of counsel for the defendants, in support of the objection upon the certificate and the motion to strike out, Roger M. Sherman, Esq., of counsel for the complainants in the cross-bill in opposition thereto, it is

ORDERED that said motion be and the same hereby is denied, and that said proof stand.

F. 1289 (Signed) E. H. LACOMBE,
U. S. C. J.

F. 1290

Exhibit 129.

ORDER THAT EXAMINER ABRIDGE PROOFS.

At a Stated Term of the Circuit Court for the Southern District of New York, held in the United States Post Office Building, in the City of New
F. 1291 York, on the 21st day of August, 1901.

Present:—Honorable E. HENRY LACOMBE,
Circuit Judge.

EMMA S. FAYERWEATHER and another, Complainants,
against
THOMAS G. RITCH and others, Defendants.

F. 1292

JOHN B. REYNOLDS,
Sole Executor of the Estate of LUCY FAYERWEATHER, deceased; Complainant,
against
THOMAS G. RITCH, &c., and others; Defendants.

In Equity, No. 6675

Upon the annexed notice of motion and affidavit of William Blaikie, verified August 19th, 1901, and proof

of service thereto attached, and upon all the proceedings herein:

After hearing William Blaikie of counsel for complainants in support of motion, and Messrs. Ritch, Woodford, Bovee and Wallace, for defendants, Ritch, Marietta College, Cornell University, and Manhattan Eye and Ear Infirmary, in opposition, it is

ORDERED that Samuel M. Hitchcock act as Examiner herein in the place of John A. Shields, until the latter's return, and that with like force and
F. 1293 effect as if it had been done by said Shields.

"He go through the records upon two days' notice of hearing by either party to the other, and eliminate all discussions as to adjournments or other side issues, all harangues of counsel, and all superfluous verbiage in the statement of objections, so that when an objection once taken at length recurs, it shall be covered in the subsequent record thereof by the brief statement "same objection," or equivalent short statement to identify it, and not repeated and extended at length.

F. 1294

"And that this direction shall apply not only to the record not yet printed for final hearing, but also to the record taken upon the plea of Hamilton College to the bill of complaint."

(Signed,) E. H. LACOMBE,
U. S. Circuit Judge.

Exhibit 130.

ORDER DENYING MOTION TO SET ASIDE DECREE AS TO HAMILTON COLLEGE.

At Stated Term of the Circuit Court for the Southern District of New York, held in the
F. 1295 United States Post Office Building in the City of New York, on the 21st day of August, 1901.

Present: — Honorable E. HENRY LACOMBE, Circuit Judge.

EMMA S. FAYERWEATHER and another, Complainants,

against

THE TRUSTEES OF HAMILTON COLLEGE, impleaded, etc., Defendants.

F. 1296

A motion having been made in this cause to vacate open and set aside the decree sustaining the plea and answer of the defendant the Trustees of Hamilton College to the amended bill of complaint herein, and dismissing said bill of complaint as to said defendant, and to read in certain depositions and other testimony in support of the said bill, and for a re-hearing upon

the said bill, and for other relief stated in the notice for said motion; and the said motion having duly come on to be heard;

NOW, on reading and filing the notice of said motion and the affidavit of Roger M. Sherman, Esq., sworn to on June 27th, 1901, in support of said motion, and the affidavit of Henry L. Stimson, sworn to August 5th, 1901, opposed; and after hearing William Blaikie, Esq., in support of said motion, and Messrs. Henry L. Stimson and James L. Bishop, opposed, it is

ORDERED, that the said motion be and the same hereby is in all respects denied.

F. 1297

E. H. LACOMBE,
U. S. Circuit Judge.

F. 1298

Exhibit 131.

STIPULATION THAT WOMAN'S HOSPITAL PLEAD LIKE HAMILTON TO AMENDED BILL.

F. 1299

UNITED STATES CIRCUIT COURT.

FOR THE SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER, and another, Complainants F. 1300 *against* THOMAS G. RITCH, &c. and others, THE WOMAN'S HOSPITAL in the State of New York impleaded and others, Defendants.	**In Equity No. 6675.**

It is hereby stipulated by and between the complainants herein and the defendant herein the Woman's Hospital in the State of New York that the plea and answer in support thereof filed by the defendant Marietta College to the amended bill of complaint herein be held to be the plea and answer in support thereof of the defendant the Woman's Hospital in the State of New York as

though the same had been duly filed herein by the Woman's Hospital in the State of New York.

Dated New York, Dec. 4th, 1901.

WILLIAM BLAIKIE,
Solicitor for the Complainants.

WILLIAM W. HOPPIN,
Solicitor for the Defendant, the Woman's Hospital in the State of New York.

F. 1301

F. 1302

Exhibit 132.

ORDER ENLARGING COMPLAINANTS' TIME TO TAKE PROOFS TILL MARCH RULE DAY, 1902.

UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF NEW YORK.

F. 1303

Emma S. Fayerweather and another, Complainants,
against
Thomas G. Ritch, &c., and others, Defendants.

John B. Reynolds, as Sole Executor of the Estate of Lucy Fayerweather, deceased, Complainant,
F. 1304 *against*
Thomas G. Ritch, &c., and others; Defendants.

In Equity No. 6675

Southern District of New York, ss.

William Blaikie, being duly sworn, says: To-day complainants' time to take proof will expire.

I am told that Mr. Bovee, who is conducting the examination for the defendants, will not return from the Bermudas for about 10 days yet. He said that he would put in more proofs. We desire time to meet them.

WILLIAM BLAIKIE.

Sworn to before me February 3rd, 1902.

S. D. EDICK,
Notary Public Kings Co.,
Certificate filed in N. Y. Co.

F. 1305

Upon the above affidavit of William Blaikie, verified February 3rd, 1902, and upon all proceedings herein, said complainants may have till and including the March, 1902, Rule day, to take proofs herein.

E. H. LACOMBE,
U. S. C. Judge.

Dated New York, February 3rd, 1902.

F. 1306

Exhibit 133.

GENERAL ORDER OF MAY 26th, 1902, AS TO ALL PLEADINGS AND RECORD.

UNITED STATES CIRCUIT COURT,

F. 1307

SOUTHERN DISTRICT OF NEW YORK.

Emma S. Fayerweather and another, Complainants,

vs.

Thomas G. Ritch, &c., *et al.*, Defendants.

John B. Reynolds, as Executor, &c.,

F. 1308 *vs.*

The Same.

In Equity, No. 6675.

SIRS:—

Please take notice that we shall submit an order, a copy of which is annexed hereto, to Hon. E. Henry Lacombe for settlement, on Monday, May 26th, 1902, at 10:45 a. m., or as soon thereafter as counsel can be heard, at Chambers. at the Court House in the Post Of-

fice Building, in the Borough of Manhattan, City and County of New York.

Dated New York, May 23rd, 1902.

RITCH, WOODFORD, BOVEE & WALLACE,
Solicitors for Thomas G. Ritch individually and as Executor, &c., Cornell University and Marietta College.

F. 1309

PARSONS, SHEPARD & OGDEN,
Solicitors for Justus L. Bulkley and Henry B. Vaughan, individually and as Executors, &c.

To Roger M. Sherman,
Solicitor for the complainants.

To William Blaikie, Esq.,
Solicitor for the cross-complainant.

To Scott & Upson,
Solicitors for Adelbert college of the Western Re-
F. 1310 serve University.

To James L. Bishop and Putney & Bishop.
Solicitors for The Trustees of Amherst college.

To Butler, Notman, Joline & Mynderse,
Solicitors for The President and Trustees of Bowdoin college.

To John McL. Nash, Esq.,
Solicitor for The Trustees of Columbia college in the City of New York.

To Russell & Holmes,
Solicitors for The Trustees of Dartmouth college.

To Root, Howard, Winthrop & Stimson,
Solicitors for the Trustees of Hamilton college.

To Swayne & Swayne,
Solicitors for Lafayette college.

To Robert J. Hare Powel, Esq.,
Solicitor for the Manhattan Eye and Ear Hospital.

To Hoadly, Lauterbach & Johnson,
Solicitors for the Mount Sinai Hospital.

F. 1311

To Redding, Kiddle & Greeley,
Solicitors for Northwestern University.

To DeForest Bros.,
Solicitors for the Presbyterian Hospital in the City of New York.

To Seth Sprague Terry, Esq.,
Solicitor for the University of Rochester.

To Marshall, Moran, Williams & McVickar,
Solicitors for St. Luke's Hospital.

F. 1312

To Putney & Bishop and William B. Putney, Esq.,
Solicitors for the President and trustees of Williams college, and for the Union Theological Seminary, in the City of New York.

To George G. and F. Reynolds,
Solicitors for Wesleyan University.

To William W. Hoppin, Esq.,
Solicitor for the Woman's Hospital in the City of New York.

To Haley Fiske, Esq.,
Solicitor for the President and Fellows of Yale college in New Haven, Connecticut.

At a Stated Term of the Circuit Court of the United States, held in and for the Southern District of New York, at the Court House in the Post Office Building in the City, County and State of New York, on the 16th day of May, 1902.

Present:—Honorable E. Henry Lacombe, Circuit Judge.

Emma S. Fayerweather and another; Complainants, *vs.* Thomas G. Ritch, *et al.*, Defendants.	In Equity No. 6675
John B. Reynolds, as Executor, &c.; Complainant, *vs.* Thomas G. Ritch *et al.*; Defendants.	

Upon reading and filing the order to show cause herein returnable here this day, and the affidavit of David F. Butcher, Esq., thereto annexed, and after hearing C. N. Bovee, Jr., of counsel for the defendants Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, individually and as executors, &c., in behalf of the application, and William Blaikie, Esq., of counsel for the complainants, opposed; and thereupon counsel for the de-

fendant the Trustees of Columbia College in the City of New York having assented in open court that the answer to the cross-bill heretofore filed by said defendant be withdrawn, and that there be substituted therefor a plea and supporting answer similar to that filed by the defendant Ritch to the cross-bill; and counsel for the defendant The Mount Sinai Hospital then assenting in open court to the withdrawal of its answer heretofore filed to the amended bill, and to the substitution therefor of a plea and supporting answer similar to that filed by the defendant Ritch to the amended bill; and counsel for the

F. 1315

defendant Northwestern University having in open court withdrawn said defendant's answer to the amended bill and also its answer to the cross-bill, and substituted therefor pleas and supporting answers similar to those filed by the defendant The Trustees of Hamilton College to the amended bill and cross-bill; and counsel for the defendant the Union Theological Seminary in the City of New York having in open court withdrawn said defendant's answer to the cross-bill, and substituted therefor a plea and supporting answer similar to that filed by the defendant the Trustees of Hamilton College to the cross-bill; and counsel for the Woman's Hospital in the City of New York having in open court withdrawn said defendant's answer to the cross-bill and substituted therefor a plea and supporting answer similar to that filed by the defendant Ritch to said cross-bill;

F. 1316

And leave having been given to the defendants the Trustees of Dartmouth College and the Mount Sinai Hospital each to enter a plea and supporting answer to the cross-bill similar to the plea and supporting answer filed by the defendant Ritch to the cross-bill;

And, thereupon, leave having been given to the complainants in the amended bill to adopt the replications already filed as the replications to the pleas thus allowed to be made by the Mount Sinai Hospital and Northwest-

ern University to the amended bill, and leave having been given to the complainant in the cross-bill to adopt the replications already filed as the replications to the said pleas allowed to be made by The Trustees of Columbia College in the City of New York, the Trustees of Dartmouth College, the Mount Sinai Hospital, Northwestern University, the Union Theological Seminary in the City of New York, and the Woman's Hospital in the City of New York to said cross-bill. . .

F. 1317

And the defendants the President and Trustees of Bowdoin College, Northwestern University and the University of Rochester having thereupon adopted, as to their proceedings under the amended bill, the testimony, proofs, objections, exceptions and record made by the defendant the Trustees of Hamilton College under the issue presented by its plea and supporting answer to said amended bill and the replication to said plea; and the defendants The Trustees of Amherst College, The President and Trustees of Bowdoin College, The Trustees of Hamilton College, Northwestern University, The Union Theological Seminary in the City of
F. 1318 New York, and The President and Trustees of William College, having adopted as to their respective proceedings under the cross-bill the testimony, proofs, objections, exceptions and record made by said defendant The Trustees of Hamilton College under the issue presented by its plea and supporting answer to the amended bill and the replication thereto; and the defendants Cornell University, The Trustees of Dartmouth College, Manhattan Eye and Ear Hospital, Marietta College, The Mount Sinai Hospital, The Presbyterian Hospital in the City of New York, St. Luke's Hospital, Wesleyan University, the Woman's Hospital in the City of New York, and The President and Fellows of Yale College in New Haven, Connecticut, having adopted as to their respective proceedings under the amended bill, and the defendants The Trustees of

Columbia College in the City of New York, Cornell University, the Trustees of Dartmouth College, Manhattan Eye and Ear Hospital, Marietta College, the Mount Sinai Hospital, the Presbyterian Hospital in the City of New York, St. Luke's Hospital, Wesleyan University, The Woman's Hospital in the City of New York, and The President and Fellows of Yale College in New Haven, Connecticut, having adopted, as to their respective proceedings under the cross-bill, the testimony, proofs, objections, exceptions and record made by the defendants Ritch, Bulkley and Vaughan under the issue presented by their pleas to the amended bill and to the cross-bill and the replications thereto;

F. 1319

And the complainants and the cross-complainant having thereupon adopted, both as against the said defendants adopting the proofs, record, &c., of the Trustees of Hamilton College, and also as against the said defendants adopting the proofs, record, &c., of the defendants Ritch, Bulkley and Vaughan, the testimony, proofs, objections, exceptions and record made by the said complainants and cross-complainant under the issue presented by the answers so withdrawn as well as by said Ritch, Bulkley & Vaughan's pleas and supporting answers and the replications thereto.

F. 1320 *NOW*, in accordance with the foregoing, it is

ORDERED, (1) That the defendants the Mount Sinai Hospital and Northwestern University have leave to withdraw and hereby do withdraw their present answers to the amended bill, and the defendants the Trustees of Columbia College in the City of New York, Northwestern University, the Union Theological Seminary in the City of New York and the Woman's Hospital in the City of New York, have leave to withdraw and hereby do withdraw their present answers to the cross-bill.

(2) That the defendant the Mount Sinai Hospital be now deemed to have filed a plea and supporting answer to the amended bill similar to that filed by the defendant Ritch to the amended bill; that the defendant Northwestern University be now deemed to have filed a plea and supporting answer to the amended bill similar to that filed by the defendant the Trustees of Hamilton College to the amended bill; that the defendants the Trustees of Columbia College in the City of New York, the Trustees of Dartmouth College, the Mount Sinai Hospital and the Woman's Hospital in the City of New York be now deemed each to have filed a plea and supporting answer to the cross-bill similar to that filed by the defendant Ritch to the cross-bill;

F. 1321

and that the defendants Northwestern University and the Union Theological Seminary in the City of New York be now deemed each to have filed a plea and supporting answer to the cross-bill similar to that filed by the defendant the Trustees of Hamilton College to the cross-bill; substituting for the name of the defendant Ritch, or the defendant the Trustees of Hamilton College, wherever appropriate, and for the names of solicitors and counsel, the name of the defendant deemed to have filed said pleading, and the names of its solicitors and counsel;

F. 1322

(3) That the complainants in the amended bill be now deemed to have filed a replication to each of said pleas hereby allowed to the amended bill, similar to the replication filed by them to the pleas of the defendants Ritch and the Trustees of Hamilton College to the amended bill; that the complainant in the cross-bill be deemed to have filed a replication to each of said pleas hereby allowed to the cross-bill, similar to the replication filed by him to the pleas of the defendants Ritch and the Trustees of Hamilton College to the cross-bill;

That the testimony, proofs, objections, exceptions and record made by the complainants in the amended bill and the complainant in the cross-bill against the defendants whose answers are withdrawn as well as against the defendants Ritch, Bulkley and Vaughan upon the issues presented by the answers so withdrawn and by the pleas of said defendants to the amended bill and the cross-bill and the replications thereto be deemed to have been also taken by the said complainants and cross-complainant against the defendants The President and Trustees of Bowdoin College, Cornell University, the Trustees of Dartmouth College, Manhattan Eye and Ear Hospital, Marietta College, Mt. Sinai Hospital,
F. 1323 the Presbyterian Hospital in the City of New York, The St. Luke's Hospital, Wesleyan University, The Woman's Hospital in the City of New York, and The President and Fellows of Yale College in New Haven, Conn., and against the defendant Adelbert College, upon the issue raised by the said defendants' pleas to the amended bill and to the cross-bill and the replications thereto; and also by said complainants against Northwestern University and the University of Rochester upon the issue raised by said defendants' pleas to the amended bill and the replications thereto; and also by said cross-complainant against the defendants the Trustees of Amherst College, the Trustees of Columbia College in the City of New York, The Trustees of Hamilton College, Northwestern University, The Union
F. 1324 Theological Seminary in the City of New York and the President and Trustees of Williams College and against the defendant Adelbert College upon the issue raised to said defendants' pleas to said cross-bill and the replications thereto, provided, however, that Adelbert College may elect within five days after the closing of defendants' proofs to adopt either the record made by the Trustees of Hamilton College or by the executors defendants Bulkley, Ritch and Vaughan.

That the testimony, proofs, objections, exceptions and record made by the defendant the Trustees of Hamilton

College against the complainants in the amended bill upon the issue raised by said defendant's plea to the amended bill and the replication thereto be deemed to have been also taken by the defendants The President and Trustees of Bowdoin College, Northwestern University and the University of Rochester against the complainants in the amended bill upon the issue raised by the pleas of said defendauts to the amended bill and the replications thereto; that the said testimony, proofs, objections, exceptions and record made by the defendant the Trustees of Hamilton College against the complainants in the amended bill upon the issue
F. 1325 raised by the plea of said defendant to the amended bill and the replications thereto be deemed to have been also taken and the defendants the Trustees of Hamilton College, the President and Trustees of Bowdoin College, the Trustees of Amherst College, Northwestern University, the Union Theological Seminary in the City of New York, and the President and Trustees of Williams College against the complainant in the cross-bill upon the issue raised by the pleas of said defendants to the cross-bill and the replications thereto;

And that the testimony, proofs, objections, exceptions and record made by the defendants Ritch, Bulkley and Vaughan against the complainants and the
F. 1326 cross-complainant upon the issue raised by the pleas of said defendants to the amended bill and the cross-bill and the replications thereto be deemed to have been also taken by the defendants Cornell University, the Trustees of Dartmouth College, Manhattan Eye and Ear Hospital, Marietta College, the Mt. Sinai Hospital, the Presbyterian Hospital in the City of New York, St. Luke's Hospital, Wesleyan University, the Woman's Hospital in the City of New York, and the President and Fellows of Yale College in New Haven, Connecticut, upon the issue raised by the said defendants' pleas to the amended bill and to the cross-bill and the replications

thereto, and also by the defendant the Trustees of Columbia College in the City of New York, against the cross-complainant upon the issue raised by said defendants' plea to the cross-bill and the replication thereto.

(5.) That the time of the defendants Ritch, Bulkley and Vaughan, and of the other defendants who have adopted the proofs and record made by the defendants Ritch, Bulkley and Vaughan, be and hereby is extended for completing their proofs to and including May 21, 1902; and such testimony, proofs, objections, exceptions and record as shall be made by said defendants
F. 1327 Ritch, Bulkley and Vaughan up to the time of completing their proofs shall be deemed also taken by the said other defendants who have adopted their previous proofs and record.

(6.) That the order entered herein on the 18th day of July, 1901, regarding the printed record for final hearing and appeal shall apply to all parties now at issue upon pleas and replications thereto.

Enter.

E. HENRY LACOMBE,
U. S. C. J.

F. 1328

Exhibit 134.

STIPULATION AS TO COLUMBIA'S PROOF.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity No. 6675.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
COMPLAINANTS,

F. 1329

against

THOMAS G. RITCH, Individually and as TRUSTEE and EXECUTOR of the Last Will and Testament of Daniel B. Fayerweather, deceased, Northwestern University, and others,
DEFENDANTS.

JOHN B. REYNOLDS, as Sole Executor of the Last Will and Testament and Codicil of Lucy Fayerweather, deceased,
COMPLAINANT,

F. 1330 *against*

THOMAS G. RITCH, Individually and as TRUSTEE and Executor of the Last Will of Daniel B. Fayerweather, deceased, Northwestern University, and others,
DEFENDANTS.

It is hereby mutually stipulated and agreed by and between the complainants and "the Trustees of Columbia college in the city of New York", one of the defendants herein, that the proofs hereinbefore taken by the defendants the Executors of Daniel B. Fayerweather, de-

ceased, shall stand for the defendant T"the rustees of Columbia college in the city of New York", and form a part of the record for said defendant under its pleadings to the original and amended bills and the cross bill herein, and that the proofs taken by the complainants shall be used by them and form a part of the record as against the said defendant "the trustees of Columbia college in the city of New York".

F. 1333

Dated New York, May 12, 1902.

F. 1331

(Signed) R. M. SHERMAN,
Solicitor for said complainants.

(Signed) WILLIAM BLAIKIE,
Solicitor for John B. Reynolds as Executor of the last Will and testament and codicil of Lucy Fayerweather, deceased.

F. 1332

(Signed) JNO. MCL. NASH,
Solicitor for defendant "the Trustees of Columbia college".

Exhibit 135

ADELBERT COLLEGE ELECTS TO ADOPT HAMILTON'S RECORD AS TO AMENDED BILL AND CROSS BILL.

UNITED STATES CIRCUIT COURT,

F. 1333

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Emma S. Fayerweather and another; complainants,

against

Thomas G. Ritch, &c., and others, defendants.

John B. Reynolds, as Executor &c., Lucy Fayerweather, deceased, complainants,

F. 1334 *against*

Thomas G. Ritch, &c., and others, defendants.

Pursuant to an order of this Court made on or about May 26th, 1900, the defendant Adelbert college of Western Reserve University hereby elects to adopt the testimony proof objections, exceptions and record made

by the defendant the trustees of Hamilton college as against the complainants in the amended bill, and as against the complainant in the cross bill in the above entitled suit.

Dated New York, June 6, 1902.

SCOTT & UPSON,

Solicitors for defendant Adelbert college of Western Reserve University.

F. 1335

F. 1336

Exhibit No. 136.

EXCEPTIONS TO CROSS QUESTIONS IN COMPLAINANTS' AND DIRECT QUESTIONS IN DEFENDANTS' PROOFS.

The complainants and cross-complainants respectively present and insist upon their certain objections stated in the record of the defendants testimony and pray the ruling of the Court thereon, and that their exceptions to the overruling of each and every of said objections may be noted.

They will further insist upon their objections appearing upon the cross-examination of complainants witnesses, and likewise pray their exceptions.

Those in the cross-examination of the complainant's witnesses are as follows, viz.:

In the cross-examination of Henry B. Vaughan.

PAGE	FOLIO	
64	127	

In the cross-examination of F. B. Myrick.

76	152	
76	152	
77	152	
78	154	

W. S. Drummond.

281	561	motion to strike out.
282	562	
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415	830	

Elizabeth Lake Goodwin.

454	908	
459	917	
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PAGE	FOLIO	
460	918	
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461	921	
462	922	
463	924	
463	924	motion to strike out.
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473	944	
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499	997	

John E. Parsons.

499	998	
501	1001	
502	1002	
502	1004	motion to strike out.
503	1004	
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504	1006	
504	1007	
504	1007	motion to strike out ans.
505	1008	
505	1009	
506	1011	
508	1015	
508	1016	

PAGE	FOLIO	
509	1016	motion to strike out.
509	1016	
509	1017	motion to strike out ans.
509	1018	
510	1020	motion to strike out ans.
511	1030	motion to strike out ans.
511	1021	
513	1024	
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513	1025	
514	1028	moved to strike out ans.
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516	1029	move to strike out ans.
526	1050	

Dr. John A. Irwin.

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David N. Carvalho.

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752	1504	moved to strike out ans.
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Dr. Maus R. Vedder.

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Dr. Allen McLane Hamilton.

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Continuation of cross-examination of Emma S. Fayerweather.

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Exhibit No. 137.

MOTION TO STRIKE OUT ENTIRE FIVE COLLEGE RECORD.

(Amherst *vs.* Ritch.)

Complainant and cross-complainant move to expunge from the record, and to strike out the record of the Five College action, on the ground that it appears by the record and the proofs that the series of decisions there not only did not adjudge the matter here, but deprived them of due process of law and the equal protection of the laws, and that it is therefore incompetent and irrelevant and of no value for any purpose as evidence in this Court.

Complaint in Reynolds vs. Ritch.

Defendants' Exhibit 3, February 14, 1901.

(Offered at folio 721.)

SUPREME COURT

OF THE STATE OF NEW YORK.

NEW YORK COUNTY.

1337

JOHN B. REYNOLDS and MORRIS B. BEARDSLEY, as Executors of the last will and codicil of Lucy Fayerweather, deceased; Mary W. Achter and Emma S. Fayerweather,

Plaintiffs,

versus

THOMAS G. RITCH, JUSTUS L. BULKLEY, and Henry B. Vaughan, individually.

Also Thomas G. Ritch, Justus L. Bulkley, and Henry B. Vaughan, as executors of the last will and testament, and of the codicils thereto, of Daniel B. Fayerweather, deceased.

1338

Also Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, as alleged trustees of the residuary estate given, devised and bequeathed to said Ritch, Bulkley and Vaughan by the said last will and codicils.

Also Bowdoin College (at Brunswick, Maine); the Trustees of Dartmouth College (at Hanover, New Hampshire); the President and Trustees of Williams College;

the Trustees of Amherst College (at Amherst, Massachusetts); Union Theological Seminary (in the City of New York); Hamilton College (at Clinton, New York); the University of Rochester (at Rochester, New York); Cornell University; Lincoln University (at Lower Oxford, Pennsylvania); the Rector and Visitors of the University of Virginia (at Charlottesville, Virginia); the Hampton Normal and Agricultural In-
1339 stitute; Adelbert College of Western Reserve University (at Cleveland, Ohio); Park College (at Parkville, Missouri).

Also the said Ritch, Bulkley and Vaughan, as the representatives of the persons and corporations hereinafter named, forming a class known as donees under the deed of *gift* executed by the said Ritch, Bulkley and Vaughan on or about the 24th day of February, 1891.

Also each of the following named persons and corporations individually, to wit: Lucy J. Beardsley, Anner Amelia Reynolds, E. M. Upham, The
1340 North western University (at Evanston, Illinois); The Mt. Sinai Hospital, the Presbyterian Hospital (in the City of New York); the Woman's Hospital in the State of New York; the Manhattan Eye and Ear Hospital; the New York Eye and Ear Infirmary; the Manhattan Dispensary (at 10th Avenue and 131st St., New York); the Montefiore Home for Chronic Invalids; the Methodist Hospital (of Brooklyn, New York); St. Luke's Hospital (in the City of New York); New

York Cancer Hospital; The Society of St. Vincent de Paul (in the City of New York); Union College (at Schenectady, New York); Haverford College (at Haverford College Post Office, Montgomery County, Pennsylvania); The University of the City of New York; the University of Pennsylvania; Brown University (at Providence, Rhode Island); the President and Fellows of Harvard University; Wesleyan University (at
1341 Middletown, Connecticut); Princeton College; Rutgers College (at New Brunswick, New Jersey); Wells College (at Aurora, New York); Elmira Female College; Vassar College (at Poughkeepsie, New York); Barnard School for Women (in the City of New York); the Cooper Union for the Advancement of Science and Art; Shattuck School (at Faribault, Minnesota); Lafayette College (at Easton, Pennsylvania); Maryville College (of Maryville, Tennessee); Trinity College (of Hartford, Connecticut); Wabash College (at Crawfordsville, Indiana); Mari-
1342 etta College (at Marietta, Ohio), and the President and Fellows of Yale College (at New Haven),

Defendants.

Plaintiff's desire the trial to be had in the City and County of New York.

Plaintiffs, complaining of the defendants, on information and belief, allege as follows:

First.—That on the 15th day of November, 1890, at the City of New York, Daniel B. Fayerweather died, being then about 68 years old.

Second.—That at the time of his death he was a resident, and domiciled at said city, and was seized and possessed of property, both real and personal, within the State of New York.

Third.—That he left surviving him his widow, Lucy Fayerweather, but no child or other descendant.

1343

Fourth.—That on the 11th day of July, 1892, said Lucy Fayerweather commenced this action by the service of summons on one of the defendants herein.

Fifth.—That thereafter, on or about the 16th day of July, 1892, said Lucy Fayerweather died, leaving a will and a codicil, by which these plaintiffs were appointed executors thereof.

Sixth.—That on or about the 9th day of September, 1892, said will and codicil were duly proved and admitted to probate in the office of the Surrogate of the County of New York, in the State of New York, and letters
1344 testamentary thereon were thereafter duly issued and granted to these plaintiffs, as executors, by said Surrogate; and these plaintiffs thereon duly qualified as such executors and entered on the discharge of the duties of their said office.

Seventh.—That on the 18th day of October, 1892, an order was made in the Supreme Court, New York County, reviving and continuing this action in the name of the executors as plaintiffs, and with the same defendants hereinabove set forth.

Eighth.—That on or about the 6th day of October, 1884, at said city, in the presence of witnesses, said Daniel B. Fayerweather signed and sealed a paper writing, of which, with its attestation by said witnesses, a copy is hereto annexed, marked "Exhibit A," and forming a part of this complaint.

Ninth.—That the defendants herein claim that said said paper writing so attached is the last will and testament of said Daniel B. Fayerweather.

1345

Tenth.—That on or about the 13th day of December, 1884, at said city, in the presence of witnesses, said Daniel B. Fayerweather signed and sealed another paper writing of which, with its attestation by said witnesses, a copy is hereto annexed, marked "Exhibit B," and forming a part of this complaint. That the defendants herein claim that said paper writing, so attested, is a codicil to said last will and testament.

Eleventh.—That on or about the 7th day of January, 1888, at said city, in the presence of witnesses, said Daniel B. Fayerweather signed and sealed another paper writing, of which, with its attestation by said witnesses, a copy is hereto annexed, marked "Exhibit C", and forming a part of this complaint.

1346

Twelfth.—That the defendants herein claim that said paper writing, so attested, is a codicil to said last will and testament.

Thirteenth.—That on or about the 19th day of March, 1889, at said city, in presence of witnesses, said Daniel B. Fayerweather signed and sealed another paper writing, of which, with its attestation by said witnesses, a copy is hereto annexed, marked "Exhibit D", and forming a part of this complaint.

Fourteenth.—That the defendants herein claim that said paper writing, so attested, is a codicil to the said last will and testament.

Fifteenth—That on the 15th day of November, 1890, at said city, in presence of witnesses, said Daniel B. Fayerweather signed and sealed another paper writing, of which, with its attestation by said witnesses, a copy is hereto annexed, marked "Exhibit E", and forming a part of this complaint.

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Sixteenth.—That the defendants herein claim that said paper writing, so attested, is a codicil to said last will and testament.

Seventeenth.—That the estate referred to in said last will and testament and said codicils left by said Daniel B. Fayerweather, at the time of his decease, consisted of property both real and personal; and still does consist of property both real and personal, of the value then of upwards of six million dollars, and of the value now of upwards of six million dollars.

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Eighteenth.—That the residuary estate referred to in the tenth clause of said last will and testament, and mentioned in said codicils, left by said Daniel B. Fayerweather at the time of his decease, consisted of property both real and personal; and still does consist of property both real and personal, of the value then of about three million five hundred thousand dollars, and now of the value of about three million five hundred thousand dollars.

Nineteenth.—That on or about the 5th day of December, 1890, the defendants Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, being the same persons named in said paper writings, petitioned the Surrogate of

the County of New York, in the State of New York, as proponents, that all of the said paper writings should be admitted to probate as the veritable last will and testament, and only codicils thereto of said Daniel B. Fayerweather, deceased. That said Lucy Fayerweather and the heirs at law and next of kin of said testator, appeared in said Surrogate's Court, and filed objections to the probate of said paper writings.

Twentieth.—That thereafter a trial was had in said Surrogate's Court, and testimony was given
1349 therein by two of said proponents and on behalf of each and all of said proponents, in support of the validity of all of said paper writings as the last will and testament and codicils respectively of said Daniel B. Fayerweather, deceased, and on the part of said Lucy Fayerweather and said other contestants against the validity thereof, and in support of the said objections; and many witnesses were examined orally, and documentary proofs were then and there taken on behalf of both said proponents and said contestants, respectively, and the testimony so taken was submitted to said Surrogate. But all the testimony said contestants had ready to offer was not then and there submitted, for reasons that will hereinafter appear.

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Twenty-first.—But that, upon the consent of proponents and contestants, said paper writing, to wit: said last will and testament of said Daniel B. Fayerweather, deceased, dated October 6th, 1884, was admitted by said Surrogate to probate as the last will and testament of said Daniel B. Fayerweather, deceased, by decree dated the 25th day of February, 1891.

Twenty-second.—That on a like consent, said other paper writings of which said Exhibits B, C, D, and E, are copies, and each of them, were admitted by said Surrogate to probate as the only codicils of said will of said Daniel

B. Fayerweather, deceased, by decree dated the 24th of March, 1891, which decree confirmed said previous decree of February 25th, 1891, and admitted said will and said codicils to be recorded as the last will and codicils of said Daniel B. Fayerweather, deceased.

Twenty-third.—That on or about the 25th day of March, 1891, said Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan respectively qualified as executors and executory trustees, of said last will and testament, and of said codicils thereto, and on or about said 25th day of
1351 March, 1891, letters testamentary thereon were issued to them out of said Surrogate's Court; and they have respectively proceeded, and are now proceeding, to act as executors and executory trustees thereunder.

Twenty-fourth.—Plaintiffs further allege on information and belief that said Ritch has been a lawyer in active practice for upwards of thirty years last past; that for more than ten years before the week on which said testator Daniel B. Fayerweather died, and up till the beginning of said week he had been said testator's confidential legal adviser, and during said ten years had so acted that he had won said testator's confidence, and had learned the amount and condition of his property and of what it consisted.

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That during all the times herein referred to, said testator was not a lawyer, or acquainted with law, but he was a dealer in leather, and was not in a position to know the law, and had not the means of knowledge of it that said Ritch had, and for his guidance in all matters of law, and of its requirements, he relied on and followed the advice and counsel of said Ritch.

Twenty-fifth.—That so relying on said Ritch, said testator, Daniel B. Fayerweather, entrusted to him the work of preparing his Will, which should dispose of the whole of said estate; and had many conferences with him

about it, and divulged to him his plans and purposes as to said property.

Twenty-sixth.—And requested him to embody them in a legal instrument which should effectuate such disposition.

Twenty-seventh.—At that time said Ritch knew that said testator's three nieces, Mary W Achter, Emma S. Fayerweather, formerly Emma S. Drury, and Lucy J. Beardsley, were his only next of kin, and that his relations with them had always been friendly, and that
1353 they, with his widow, Lucy Fayerweather, had he died intestate, would have inherited by law, the whole of his estate.

That he had been married to his said wife, and they had lived affectionately and happily together for nearly half a century.

And that he had repeatedly declared that he would give a very large portion of his estate to his said wife.

Twenty-eighth.—That said Ritch, having been so entrusted with the drawing of said will, thereupon prepared said will, and influenced and prevailed upon said testator, Daniel B. Fayerweather, to, in his said will, almost entirely ignore his said wife and his said next of kin, and the ties of affection and blood, and to ap-
1354 parently give nearly all of his great estate to eleemosynary and educational institutions.

And told him that, if his wife outlived him, the law would not let him give that much to institutions; because it aggregated more that one half his estate above his debts.

And that the law forbade such gift of over such one-half.

And told him that, if he should die within sixty days after executing said will, Paragraph Ninth thereof, in so far as it affected more than one-half of said estate, would be void.

Corruptly suppressing, however, and concealing from him the real effect and meaning of said paragraph, as will presently appear.

Said Ritch, with corrupt and evil intent, further told him that some of the institutions named in said Paragraph Ninth might be prevented by their respective charters or by law from taking as large a bequest as said paragraph seemed to give them.

But that there was a way out of these difficulties, namely:

That he could wait until sixty days had passed.

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That he, said Ritch, would then draw a codicil to said will, which, when duly executed, would at the death of said testator, give to said Ritch, and to his sole co-executor, Bulkley, the absolute title to all said residue.

Twenty-ninth.—And that, after he had executed said codicil, he, Ritch, would then sacredly promise and assure him that he and said Bulkley would so divide said residue among said corporations, that with what the law would let said testator give them, directly by his will, and what said Ritch promised that he and said Bulkley would thus give them, they would each get enough to make up not only the full amount opposite the name of each in said
1356 Paragraph Ninth, but would thus also each get one-twentieth of any residue that might yet remain after they had been paid in full their respective bequests named in said Paragraph Ninth.

Thirtieth.—And that it would be safe, and legal, and right for said testator to do so;

And that he, Ritch, would conduct the matter properly in every way;

And as he would wish to have him do.

Thirty-first.—Influenced by said Ritch, and induced by said long acquaintance with him;

And by his knowledge of the law;

And by his said representations and assurances;

And by their apparent truth and candor, and pertinence;

And never thinking that said Ritch was corruptly intending to mislead or deceive him;

But relying on him, and on his said representations and assurances,

And for no other reason,

Said testator, Daniel B. Fayerweather, agreed with Ritch thereto; and said Ritch thereupon promised him that he, Ritch and said Bulkley, would so dispose of said res-
1357 idue as above set forth, and relying upon said Ritch's said promise, allowed said Ritch to prepare said last will and testament in his own way, and thereafter, to wit, on or about the 6th day of October, 1884, said Ritch did prepare a paper writing and induced said testator to execute it as and for his last will and testament, (a copy of which, marked Exhibit A, is hereto annexed.)

And to further lead him to believe that said Exhibit A could be made to stand as his will, on said 6th day of October, said Ritch also prepared the following apology to said widow, and next-of-kin, for depriving them of their right, and then and there induced said testator to sign the same, and led him to believe that it would aid in making said will effectual, and would keep said widow and next-of-kin from contesting it.

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The apology reads thus:

"NEW YORK, October 6th, 1884.

"This certifies that I have executed my will of this "date, having been advised by my counsel of the pro- "visions and restrictions of the law of this State relative "to benevolent corporations. I trust my heirs will permit "the provisions of this my will to be carried into effect.

"D. B. FAYERWEATHER."

Thirty-second.—And about sixty days later, influenced and induced, and believing, and relying as aforesaid, and

because of this importunity of said Ritch, and for no other reason, he allowed him to prepare said codicil (of which Exhibit B, hereto annexed, is a copy), which, on or about the 13th day of December, 1884, at said City of New York, said Ritch induced him to execute, and which he did then and there execute.

And to further lead him to believe that said will and said codicil could be made to stand in law, and to dispose of said testator's property as he, said testator, believed they would do, and to keep said widow and said next-of-kin from contesting as aforesaid, said Ritch also
1359 wrote and induced said testator at about the date of said first codicil to sign a paper of which the following is a copy.

"NEW YORK, Dec. the 11, 1884.

"PRIVATE MEMORANDUM.

"I have made Messrs. Bulkley and Ritch my residuary "legatees, in the confidence that thereby my intentions as "expressed in my will shall be carried into effect, and "without litigations on the part of any person or persons "interested.

"In case of my death I trust they will take such steps "by will or otherwise, as will protect my estate against "the contingency of the death of either before my
1360 "estate is settled and distributed.

"D B. FAYERWEATHER."

"(The envelope accompanying the letter is addressed:

"MESS. J. L. BULKLEY AND T. G. RITCH.
"To be opened in case of my death)".

And at or about the time said testator executed said will, and again at the same time he executed said first codicil, said Ritch made to him said promise and assurance, which he had agreed as aforesaid to make.

Thirty-third.—But the real purpose of said Ritch in so advising and influencing said testator was to mislead and

deceive said testator, Daniel B. Fayerweather, and to deprive his said widow, and next-of-kin, and said institutions of what said testator meant to give them, and to illegally and wrongfully obtain possession and control of said estate, and to wrongfully convert the greater part of it to his own use.

Thirty-fourth.—For he, Ritch, knew that he wanted to give a part of his property to said institutions;

And that he was devotedly fond of his wife,

And on pleasant and affectionate relations with
1361 his said only next-of-kin;

And that he believed that said Ritch was in every way worthy of said confidence, and that, at the time he, said Ritch, made said representations, agreement and promise, said representations were untrue, and that said agreement and promise could not be lawfully kept; and that said devise and bequest of said residue to said Ritch and Bulkley to be theirs absolutely, but in reality in trust for said institutions, was prohibited by law; and was void.

Thirty-fifth.—Knowing these things, said Ritch, with corrupt and evil intent, prepared said will and said first codicil thereto, so that they would directly thwart those purposes of said testator.

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And would give nearly the whole of said vast estate to persons that said testator, Daniel B. Fayerweather, did not intend it for, and that it could not, by any lawful or proper means possibly reach.

Thirty-sixth.—And said Ritch knew that the trust he had thus concocted was illegal.

And that, though he did not mean to carry it out, and his associate Bulkley did, yet the latter was absolutely prohibited by law from doing so.

Thirty-seventh.—And he knew that he, Ritch, stood in the attitude of having procured and induced said testator to make a bequest to himself and associate, by asserting its necessity, and promising faithfully to carry out the charitable purposes for which it was made; and that whether his associate knew and promised or not made no difference, where this request was to them as joint tenants, or otherwise jointly, and both must get their rights through the result accomplished by one.

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Thirty-eighth.—And he knew that for him not to carry out the promise, by which alone he procured said devise and bequest, was to perpetrate a fraud on the testator, which equity will not endure;

And that he intended to take advantage of that which he had done on the faith of said agreement, while repudiating its obligations under the law.

Thirty-ninth.—And that the uses so enjoined were for the benefit of those incapable of taking;

And that such taking would be in direct violation of the law of this State.

1364

Fortieth.—And that he was thus intentionally a party to an agreement which produced an absolute bequest of gigantic proportions, and to the fraud of a beneficial holding, secured by a contrary promise.

Forty-first.—And that, even if ever so honorably willing to perform that promise, he could not do so without secretly evading and setting at defiance the law and general policy of this State.

And that, if he was willing to perform that promise, he could not do it except by a fraud on the law, to which he and said testator were equal parties, which fraud he had led that testator to commit.

And that, if he repudiated his obligations under said promise, it would be a fraud on the dead man, who had acted on the faith of that promise.

Forty-second.—And he knew that the fraud remained and existed a grave injury to the testator's widow and to his next-of-kin;

And that it was not only a fraud against them, but a fraud upon the law, since it was an admitted and declared effort to accomplish by a secret trust what could not
1365 on the face of the will, and with the existing facts, be done at all.

Forty-third.—And that in such a case, on the ground of fraud, equity will fasten a trust, *ex maleficio*, upon the fraudulent residuary legatees;

Forty-fourth.—And that he, and said Bulkley, were aiming at an evasion of the law, and seeking the shelter of unauthorized purposes;

Forty-fifth.—And that if they held said estate beneficially, it would be fraud upon this testator, and on the intended objects of his bounty;

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Forty-sixth.—For that said property would be devoted to unauthorized purposes in fraud of the law, and of the widow and next-of-kin;

Forty-seventh.—And that thus, out of the impossibility of performing, except in defiance of the public law, there arose a legal fraud;

And that in such case, they, the residuary legatees, could not honestly hold;

And that if they did hold, fraud would triumph unless equity defeated it through the operation of a trust, and

protected those justly entitled—to wit, the widow and next-of-kin;

And that, if equity would not touch this bequest, by putting a trust for the widow and next-of-kin upon the fund in the hands of said Ritch, and said Bulkley, the road to an evasion of the statutes of this State, and to the temptations of necessity or greed would be left wide open.

Forty-eighth.—And that said testator did intend an absolute bequest to said Ritch and his associate, on the face of the will;

1367

And that he did *not* intend that they should have the resulting beneficial interest;

But that he relied on the promise of said Ritch to carry it elsewhere;

And that our law prohibits the artifice of an absolute bequest, coupled with a secret agreement;

Forty-ninth.—And that gifts and transfers made in this way are prohibited.

And made void.

1368

Fiftieth.—He, said Ritch, at said times knew these things, and he knew that it was distinctly planned between him and this testator that the understood and declared purposes which could not be lawfully carried out by a bequest, on the face of the will, should be effected by an absolute devise and bequest, coupled with an honorable obligation to hold and appropriate the property to forbidden uses.

Fifty-first.—And that an evasion of the law was the very occasion and object of this absolute devise and bequest.

Fifty-second.—Plaintiffs further allege, on information and belief, that at all said times, said testator, Daniel B. Fayerweather, was ignorant of these matters above set forth; and that said Ritch knew he was ignorant of them;

And neither at the time of the execution of said will, or of said codicil, or of the making of said agreement, or of said promise, or at any other time, did he, said Ritch, disclose his said knowledge of said facts, and of the law touching said testator's rights, and affecting the disposition of his estate, to said testator, Daniel B. Fayerweather.

1371

But, with corrupt and evil intent, he concealed them and kept them from him, to wrongfully obtain and convert a large part of said property to his own use.

Fifty-third.—Had said testator, Daniel B. Fayerweather, known said law and said facts, or any of them so concealed from him by said Ritch, he would never have entered into said agreement;

Nor have executed said Paragraphs Ninth and Eleventh of said will:

Nor said first codicil thereto, nor have signed said two letters:

Nor have entered into said agreement with said Ritch;

1372

Nor have believed his said promise:

Fifty-fourth.—Plaintiffs further, on information and belief, allege that said Ritch, in making to said testator, Daniel B. Fayerweather, said representations in regard to said Paragraph Ninth, and as to its effect, and as to its ability to legally carry any bequests therein named, or any part of such bequests to the respective institutions therein named, knew that said testator was ignorant of the following facts:

Which facts said Ritch well knew at the time he made said representations, and it was his duty to then make them known to said testator:

Fifty-fifth.—And which facts, with corrupt and evil intent and to deceive said testator, and to wrongfully obtain his property from him, and to wrongfully convert to his own use, he, said Ritch, omitted to then, or at any other time, disclose to said testator, Daniel B. Fayerweather, and kept them back and concealed them from him, and which facts are as follows, to wit:

Fifty-sixth.—That the beneficiaries named in said Paragraph Ninth, could take nothing by virtue either
1373 of anything in said paragraph, or in any other part of said will, or by virtue of any codicil thereto;

Fifty-seventh.—That, before any of said institutions named in said Paragraph Ninth could take any property thereby, or thereunder, they must have the consent both of said Ritch and of said Bulkley;

Fifty-eighth—That by virtue of said will and of said first codicil, if they had any force or validity whatever, said testator had empowered said Ritch and said Bulkley to dispose of said $2,100,000, to other persons than the beneficiaries named in said Paragraph Ninth;

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Fifty-ninth.—That the execution of all and of every part of said Paragraph Ninth, depended expressly on the will of said Ritch and Bulkley, and on whether they regarded it expedient to endow such beneficiaries; or to withhold any or all of the said bequests from them;

Sixtieth.—That the amount of such endowment of each such beneficiary was in the absolute discretion of said Ritch and of said Bulkley;

And must be determined by them before it could be applied to the use of such beneficiary;

Sixty-first.—That the power in trust given in said Paragraph Ninth, and in said first codicil, was, both as to its subject and object, of so indefinite a character that the Court in equity could not decree its execution, should said Ritch and Bulkley omit, or fail to execute their right, or perform their duty;

Sixty-second.—That the said power was incapable of being execute by judicial decree, or compelled by any person other than said Ritch and Bulkley, because
1373 there were no parties interested thereunder (save said widow and said next of kin);

And no fund set apart which such party could claim;

Sixty-third.—That whether there would ever be such party, or such fund, depended entirely on the affirmative action of said Ritch and of said Bulkley;

Sixty-fourth.—That said Ritch and said Bulkley were not required by said will or codicil to devote all or any of said $2,100,000 to educational uses or purposes at all;

Sixty-fifth.—That said Ritch and said Bulkley were not required to distribute said entire $2,100,000 between said alleged beneficiaries named in said Paragraph
1374 Ninth, selecting and excluding as they pleased, *but exhausting said fund on them all.*

Sixty-sixth.—And that none of said institutions would have a right to all or any of said $2,100,000 without the express consent of said Ritch alone.

Sixty-seventh.—Said plaintiffs, on information and belief, further allege:

That from the time of the execution of said will, namely, October 6th, 1884, till the death of said testator on the said 15th day of November, 1890, said Bulkley did not know that he had been named as a residuary legatee in said will, or in any codicil thereto;

Sixty-eighth.—Nor during all said period did said Bulkley know of the contents or existence of said letters of October 6th, 1884;

Or that they, or either of them, had ever been written;

Sixty-ninth.—That during all that period said Ritch retained possession of both said letters, and studiously concealed their existence and contents from said Bulkley;

And from said widow and said next of kin;

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Seventieth.—And, though familiar with all said facts as aforesaid, was content to leave, and did leave, his seeming absolute title to said residue unexplained and unrebutted until compelled by the Surrogate himself to testify to it on the demand of said widow and of said next of kin;

Seventy first.—Whereas he, said Ritch, knew that the real purpose of said testator as aforesaid, was not to give away any of said estate to said Ritch and Bulkley absolutely;

Seventy-second.—But was to give said residue to said Ritch and said Bulkley *only as trustees;*

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And that said testator believed that by thus doing as Ritch directed, he was so giving it in trust;

Seventy-third.—And that said Ritch knew that if the contents of said letters remained undiscovered, and he did not disclose them to said Bulkley, or to any one else, no proof could be produced to show that such great residue did not belong to him, and to said Bulkley absolutely;

Seventy-fourth.—That said Ritch, with corrupt and evil intent, purposed to conceal said letters and their contents from every one.

And to keep for himself and for said Bulkley all of said residue, and never give it to either of the beneficiaries named in said Paragraph Ninth, or to any of them;

Or to its rightful owners, to wit; said widow and said next of kin.

Seventy-fifth.—Plaintiffs further, on information and belief, allege:

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That said Ritch knew as aforesaid, that said Paragraph Ninth, and said Paragraph Eleventh, so far as it was intended to aid and effectuate the purposes set forth in said Paragraph Ninth, were incapable of enforcement, and were void;

Seventy-sixth.—And that he knew that the money which said Paragraph Ninth professed to bequeath to the institutions within it named, would therefore drop into, and become part of the residue of said testator's estate.

Seventy-Seventh.—And that he knew that, if his said agreement with said testator, and his said promise to him should never become known, and should never be
1378 kept and carried out;

And that if he succeeded in keeping said widow and said next of kin from effectually contesting said will and said first codicil thereto, he and said Bulkley would then become in fact the absolute owners, not only of the residue of said testator's entire estate left after paying the small specific legacies mentioned in other clauses of said will, and the debts of said estate which were few and small in amount, leaving upwards of five million dollars worth of property;

Seventy-eighth.—And he knew that said testator, Daniel B. Fayerweather, was ignorant of the fact that

said will and said first codicil, and said agreement and promise, would not give all or any of said $2,100,000, to all or any of said institutions named in said Paragraph Ninth at all ;

Seventy-ninth.—And he, Ritch, knew that said testator believed that said will and codicils, and said agreement and promise, would be effectual to give, out of his said estate, to each of said institutions the amount set opposite its name in said Paragraph Ninth ;

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Eightieth.—And he knew that said testator had entire confidence in him, and believed that he, Ritch, would do everything necessary to have said amounts reach said institutions respectively ;

Eighty-first.—That said Ritch, knowing these facts, suppressed and concealed them from said testator, Daniel B. Fayerweather, with the corrupt and evil intent to illegally and wrongfully get possession and control for himself and said Bulkley, and to illegally and wrongfully obtain absolute ownership of one-half of said residue, and of one-half of said $2,100,000, and of the in-
1380 crement thereof, and by said suppression said Ritch and said Bulkley, illegally and wrongfully gained possession of said estate and wrongfully converted nearly all of the same to their own use.

Eighty-second.—Plaintiffs further, on information and belief, allege ;

That with corrupt and evil intent, said Ritch not only influenced and advised said testator, Daniel B. Fayerweather, to let him prepare said will, and said first codicil thereto, in the manner and terms aforesaid ;

And that he procured the execution of both of said instruments by said testator as aforesaid ;

Eighty-third.—But that, with like intent, said Ritch also prepared said second codicil, and said third codicil, and procured the execution of both of them, by said testator;

Eighty-fourth.—And that he not only so wrote himself down a devisee and legatee, as aforesaid;

But that, with like intent, in pursuance of his scheme to obtain for himself as much of said estate as he could, said Ritch so prepared said second codicil (of
1381 which Exhibit C, hereto annexed, is a copy) that it omitted all gift, devise, or bequest, residuary or otherwise, to said Vaughan, and made him merely an executor and trustee;

Eighty-fifth.—Yet with like intent, said Ritch so worded said second codicil that he led said testator to believe that by it he, Daniel B. Fayerweather, had made said Vaughan a co-residuary devisee, and co-residuary legatee to the same extent and amount, and in all respects as he had, by said will, and by said first codicil, made said Ritch and said Bulkley.

Eighty-sixth.—Plaintiffs further, on information and belief, allege:

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That said Ritch, with corrupt and evil intent, not only originated and conducted the whole business of said will, and of said three codicils as aforesaid,

And so omitted said Vaughan from all share, or apparent share, in said estate as aforesaid;

Eighty-seventh.—But that said Ritch, with corrupt and evil intent, was present at all the material parts of said transaction, and of said attempts to make testamentary disposition of said entire estate;

Eighty-eighth.—That said Ritch, with like intent, saw to it that said will, and each of said first three codicils thereto, were drawn, either by the partner or confidential employee of said Ritch, under said Ritch's supervision, or by said Ritch himself personally ;

Eighty-ninth.—That said Ritch, with like intent, supervised the execution of said will and of said codicils himself ;

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Ninetieth.—That said third codicil (of which Exhibit D hereto annexed is a copy), was unimportant to said Ritch, and in no way affected his interest in said estate, and so he did not furnish the witnesses to *it ;*

Ninety-first.—But that at each of the four times when said will and said other codicils (of which Exhibits A, B, C and E, hereto annexed, are respective copies), were executed, each one of which did affect, or seemed to affect, said Ritch's interests,

Said Ritch furnished from his own partners and confidential employees each of the three witnesses needed at three out of said four executions of said instruments ;

1384

Ninety-second.—From the same source, said Ritch furnished two out of the three witnesses at the fourth of said executions, the third witness in the last instance being a young lady unfamiliar with such matters.

Ninety-third.—That neither at the execution of said will, nor of any one of said four produced codicils, was either the widow of said testator, Daniel B. Fayerweather, or any one of his heirs at law or next of kin either asked to be present, or in fact, present ; nor were either said widow, or said heirs at law and next of kin informed of

the time when, or the place where any one of said five instruments was to be executed ;

Nor that any one of said five instruments was to be executed at all ;

Ninety-fourth.—Nor were either said widow nor of any said heirs at law and next of kin at any time prior to the death of said testator, Daniel B. Fayerweather, informed of what provisions, either his said will, or any one of said codicils thereto contained, or what directions was being given them whatever.

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Ninety-fifth.—That said Ritch, with corrupt and evil intent, kept and concealed from said widow, and from said next of kin the fact that he had thus prepared for said testator said will and codicils thereto, and had procured the execution of them by said testator as aforesaid, which will and codicils entirely deprived them of their inheritance in said residuary estate, to wit, of the whole of it ;

Ninety-sixth —That this studied privacy in the preparation, supervision and execution of said will and of said codicils and of said two letters above set forth, and in the making of said secret agreement and promise ;

1386

And in the exclusion of said widow and of said heirs at law and next-of-kin therefrom, and in debarring them of all knowledge thereof ; and in the cutting off of said Vaughan from all interest in said residuary estate, and in the concealing from said widow, and from said heirs at law, and from said next-of-kin, and from said Vaughan the contents of said two letters as aforesaid ;

Were each and all done by said Ritch with corrupt and evil intent to get illegal and wrongful possession and control of nearly all of said estate, and to illegally and

wrongfully convert the same to his own use, and to the use of said Bulkley;

Ninety-seventh.—And said Ritch and said Bulkley did thereby gain the said illegal and wrongful possession of said estate;

And did thereby illegally and wrongfully convert nearly all of said estate to their own use.

1387

Ninety-eighth.—Plaintiffs further allege, on information and belief;

That in and by said second codicil, dated the 7th day of January, 1888 (of which Exhibit C, hereto annexed, is a copy), said Henry B. Vaughan was nominated and appointed an executor of said will, and a trustee of said testator's estate, in addition to said Ritch and said Bulkley;

And by said second codicil was given the same powers and authority in every respect as were conferred on said Ritch and Bulkley by, in, and under the said will.

Ninety-ninth.—But said Vaughan was *not* either by said will, or by said first codicil, dated December
1388 13th, 1884, or by said last named codicil, dated January 7th, 1888, made *residuary devisee and legatee*, or made any devisee or legatee whatever, of all or any part of the estate of said testator, Daniel B. Fayerweather, deceased.

Nor was said Vaughan named in, or made any devisee or legatee whatever by said codicil dated the 19th day of March, 1889 (of which Exhibit D, hereto annexed, is a copy).

One Hundredth.—Plaintiffs further allege, on information and belief;

That said Vaughan did not find out that in and by said will and said first three codicils, he had been excluded

from a like share with said Ritch and Bulkley, in said estate, and from all share in it whatever, until on or about the 10th day of November, 1890;

One Hundred and First.—That he, said Vaughan, discovered it under the following circumstances, to wit;

That the said Vaughan had for many years, prior to said 10th day of November, 1890. been engaged in the same kind of business as said testator had, namely, the hide and leather business;

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That, during much of said period, said testator knew him well, and regarded him as his intimate friend;

And reposed great confidence in his integrity, and in his business judgment;

One Hundred and Second.—Shortly before his death, said testator mistrusted that his said will and its said first three codicils would not dispose of his estate as he had intended to dispose of it;

One Hundred and Third.—At this time, namely, on or about the 10th day of November, 1890, greatly enfeebled by disease, and within a few days of his death, he
1390 sent for said Vaughan, and asked to examine said will and said codicils, and to advise him whether they meant what he, said testator, believed that they did.

One Hundred and Fourth.—And he, said testator, then sent to said Ritch for said instruments;

But said Ritch only sent him back what he said was a copy of them and retained the originals himself;

One Hundred and Fifth—Said testator, Daniel B. Fayerweather, thereupon demanded from the said Ritch, the immediate delivery to him of said originals;

And thereupon said Ritch sent them to said testator by said Vaughan;

One Hundred and Sixth.—Said Vaughan then read them, and on discovering that said Ritch had in them, written in, for himself, a vast legacy;

But had only put said Vaughan down as an executor, and trustee, but not as *legatee* at all;

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One Hundred and Seventh.—And that said will and said first three codicils, diverted more than one half of said estate to persons for whom said testator did not intend it at all;

One Hundred and Eighth.—Said Vaughan then and there, to wit, on or about the tenth day of November, 1890, in the presence and hearing of said testator, Daniel B. Fayerweather, *denounced said Ritch as a scoundrel;*

One Hundred and Ninth.—And he thereupon, by and with the consent of said testator, went to other counsel than said Ritch, to wit, his own counsel, and he, Vaughan, directed his said counsel to prepare, and they then did prepare another paper writing;

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One Hundred and Tenth.—And on the 11th day of November, 1800, four days before his death, at said City of New York, in the presence of witnesses, said testator, executed said last-named paper writing, as and for a codicil to his said will;

And the same was then and there duly attached by said witnesses.

One Hundred and Eleventh.—Said Vaughan did not, however, inform said Ritch that he was having said co-

dicil prepared; or what its contents were; or that said testator would execute it; or when or where it should be executed.

One Hundred and Twelfth.—The contents of said codicil of November 11th, 1890, are unknown to plaintiffs;

But they are informed and believe that said codicil revoked said first codicil dated December 13th, 1884, and bequeathed to said testator's said widow, Lucy Fayer-
weather, to his said next of kin, and to his wife's
1893 sister, then Anner Amelia Joyce, (now Anner Amelia Reynolds), out of said residuary estate, upwards of one million dollars;

One Hundred and Thirteenth.—And that, after certain other bequests to individuals therein named, the rest of said residuary estate was to be divided, share and share alike, among said institutions named in said Paragraph Ninth of said will, of October 6th, 1884, of (which Exhibit A, hereto annexed, is a copy)

One Hundred and Fourteenth.—That one of said plaintiffs, prior to the commencement of this action, requested said Vaughan to acquaint him with the contents of said missing codicil;

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But that said Vaughan replied that he, said plaintiff, would never know what said missing codicil contained.

One Hundred and Fifteenth.—But for their information in the matter, plaintiffs ask that said Vaughan be required to produce said codicil at the trial of this action.

One Hundred and Sixteenth.—Plaintiffs further, on information and belief, allege:

That as soon as said testator, Daniel B. Fayerweather, had executed said missing codicil, dated November 11th,

1890, said Vaughan with corrupt and evil intent, took possession and kept possession of it throughout the remaining days of the life of said testator;

That after thus procuring the execution of said codicil by said testator, said Vaughan with corrupt and evil intent, kept from said widow and said heirs-at-law and next of kin, the fact that no part of said residue, so far as said residue exceeded one-half of the testator's estate over and above his debts, could go to said institutions, or to any of them.

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And that said missing codicil, in so far as it attempted to give and bequeath to said institutions, or to any of them any part of such residue, composed of such excess over said one-half, was illegal and void;

And that, besides what was bequeathed by said codicil to said widow and said next of kin, they were also entitled by law to all the rest of said residuary estate, so far as it exceeded such one-half, and so far as it was bequeathed thereby to said institutions named in said Paragraph Ninth, or to any one of them.

One Hundred and Seventeenth.—Plaintiffs further, on information and belief, allege:

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That at the time of the execution of said missing codicil of November 11th, 1890, said Vaughan thought said testator would probably live for several weeks, if not for several months thereafter;

But said Vaughan daily watched his condition, and the progress of his disease, and late in the forenoon of Saturday, November 15th, 1890, he learned from the attending physician that said testator, Daniel B. Fayerweather, was very near to death.

One Hundred and Eighteenth.—Said Vaughan, on learning of this fact, and without advising said testator of

his purpose, and without any authority from him, went hurriedly, upward of four miles, to said Ritch; what he said to him is unknown to plaintiffs;

And in a very little while he obtained from said Ritch, or from his law partner, another paper writing and hurried back to the death-bed of said testator;

One Hundred and Nineteenth.—Said testator, Daniel B. Fayerweather, had at that time become so weak that he was barely able to speak, and could only answer
1397 most questions by a motion of the head.

One Hundred and Twentieth.—Said Vaughan then and there produced said paper writing which he had just had prepared by said Ritch, or his partner, or by both of them together, and about 2 P. M., on the said 15th day of November, 1890, with corrupt and evil intent, prevailed on said testator, Daniel B. Fayerweather, to sign it in the presence of witnesses, whose attestation was then and there annexed.

One hundred and Twenty-first.—That the defendants herein claim that said paper writing, so attested, and the execution of which was so procured by said Vaughan, is a codicil, and they claim it to be the fourth codicil to
1398 said last will and testament.

One Hundred and Twenty-second.—Said last codicil, while expressly confirming said first, second and third codicils (of which Exhibits B, C and D hereto annexed are respectively copies), omits all mention of said missing codicil, the execution of which by said testator was so procured by said Vaughan as aforesaid, and neither confirms nor revokes it.

One Hundred and Twenty-third.—And it makes another omission:

Plaintiffs are informed and believe that said missing codicil, dated November 11th, 1890, took said residuary

estate entirely away from said Ritch and said Bulkley; nor did it give any of said residue to said Vaughan;

But said last codicil of all, namely, that made on the day said testator died, November 15th, 1809, so dictated by said Vaughan, and so drawn at said Ritch's office, gives the entire residue of said estate to said Ritch, said Bulkley, and said Vaughan, and to their heirs absolutely forever.

One Hundred and Twenty-fourth.—That it makes no other change, either in said will, or in said codicils,
1399 except such as was needed to made said Vaughan a residuary legatee, as well as said Ritch and said Bulkley, and thus to put him in every way on exactly the same footing as he had five days before found said Ritch and Bulkley;

Except that, before said Vaughan had thus had himself written in a residuary legatee, said Ritch and said Bulkley, so far as said will and its said first three codicils alone were concerned, would have each had one-half of said residuary estate;

But after said last codicil was executed, they would each inherit only one-third of it.

One Hundred and Twenty-fifth.—That said Vaughan had said last codicil prepared on his own responsi-
1400 bility, and without any authority from said testator, Daniel B. Fayerweather.

That he neither received any instructions from him to have it made, nor made known to him what he proposed to have inserted in it;

That said testator did not even know that said Vaughan intended to have said last codicil prepared.

One Hundred and Twenty-sixth.—That when on said November 15th, 1890, said Vaughan learned from said physician that said testator was near the point of death, he asked said physician to be at the bedside of said tes-

tator at four o'clock on the afternoon of that day, and witness said testator's execution of a paper, the character of which he did not define.

One Hundred and Twenty-seventh.—And he then further requested him to have another physician there at that hour, to also witness said execution.

One Hundred and Twenty-eighth.—And said physician first referred to then and there agreed with said
1401 Vaughan that he would so attend at said hour, and would have said other physician there also; and both of said physicians were ready and willing to so attend;

One Hundred and Twenty-ninth.—But before that hour arrived, said Vaughan notified both said physicians not to so attend;

And they thereupon did not so attend.

One Hundred and Thirtieth.—But said Vaughan, without giving any reason therefor, procured other witnesses, to wit, two confidential employees of said Ritch, and had them act as witnesses of the execution of said last codicil;

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One Hundred and Thirty-first.—That said testator, Daniel B. Fayerweather, was at this time rapidly sinking, and was so greatly weakened and enfeebled, and emaciated by the ravages of said disease, that he could only hear and see with much difficulty, was gasping for breath, and could hardly utter a word;

And that he died within less than nine hours afterward.

That, when on or about November 10th, 1890, said Vaughan so denounced said Ritch before said testator as aforesaid, said testator not only joined in that denunciation;

But he refused to again see said Ritch. or to have anything further to do with him, although he willingly saw everyone else who wished to see him;

And he never saw him again.

That shortly after said Vaughan procured the signature of said testator to said last codicil, on the 15th day of November, 1890, a few hours before his death, said testator, Daniel B. Fayerweather, appearing to realize what he was doing, suddenly aroused himself and seeing said Vaughan ordered him out of the room, and out of the house.

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One Hundred and Thirty-second.—Plaintiffs further, on information and belief, allege:

That, although said estate was nearly all personal property, instead of receiving upwards of five million dollars thereof, which would have belonged to the widow of said testator, and to his next of kin, who are co-plaintiffs herein, had he, said Daniel B. Fayerweather, died intestate; no provision was made for said widow at all, nor for said next of kin, in such of said testamentary papers as said Ritch, Bulkley and Vaughan saw fit to offer for probate, as aforesaid;

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Except that said widow was given in all, property worth less than one hundred thousand dollars, to wit, about one-sixtieth part of said estate, instead of the one-half thereof allowed her by law; and she was also given an annuity of fifteen thousand dollars;

And except that said heirs at law and next of kin, co-plaintiffs herein, were each given only twenty thousand dollars, to wit, about one three hundreth part of said estate, instead of one-sixth part thereof as allowed by law.

One Hundred and Thirty-Third.—Plaintiffs further, on information and belief, allege:

That although said widow, and said co-plaintiffs, next of kin, had always lived on affectionate relations with their relative, Daniel B. Fayerweather, as aforesaid;

Yet, by such testamentary papers as said Ritch, Bulkley and Vaughan thought best to offer for probate, were thus cast off with a comparative pittance;

Said Ritch, Bulkley and Vaughan, at about the time said contest terminated so abruptly, as aforesaid, prevailed upon said widow, and said co-plaintiffs, next of kin,
1405 to agree to release, and so induced, they thereafter did release their respective rights in and to said estate, in consideration of their adding ten thousand dollars to saidwidow's annuity, and of their giving her two hundred and twenty-five thousand dollars out of the estate, which said Ritch, Bulkley and Vaughan, by said will, said produced codicils, said agreement with said testator, and said sacred promise to him, had distinctly agreed, and had led him to believe, would go to such other purposes as aforesaid;

And in consideration of their giving to each of said next of kin thirty thousand dollars more.

One Hundred and Thirty-fourth.—Said widow, and said next of kin, being thus permitted by said Ritch,
1406 Bulkley and Vaughan to have in all about one-twentieth of said estate instead of upwards of sixteen-twentieths thereof;

And said widow being allowed to have in all, as annuity, the income of about one-twelfth part of said estate.

One Hundred and Thirty-fifth.—Plaintiffs further, on information and belief, allege:

That said Ritch, Bulkley and Vaughan so prevailed upon said widow and said next of kin to so agree to release said rights under the following circumstances, to wit:

That shortly after said draughtsman of said missing codicils refused to obey the order of the Surrogate to testify to its contents, as aforesaid, said Ritch, Bulkley and Vaughan proposed to said widow and to said next-of-kin, co-plaintiffs herein, that if they would withdraw from said contest and would consent to the probate of said will and said offered codicils and would agree to release all their said rights they would give to said widow and said next-of-kin, out of said estate, the additional amounts above set forth.

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One Hundred and Thirty-sixth.—That said three ladies were not acquainted with law nor with the custody and management of estates, and did not know to which portion of said estate they would respectively be entitled in case said will and said offered codicils should be set aside and declared void, either in whole or in part:

That when they heard that said Ritch, Bulkley and Vaughan had by their deed of gift (of which Exhibit F, hereto annexed, and forming part of this complaint is a copy) already apparently disposed of said residuary estate they believed that their own rights to it were thereby cut off.

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And that said widow and said next-of-kin did not know that the bequest of said residue to said Ritch, Bulkley and Vaughan, coupled with said secret agreement and promise to evade the statute, were void in law;

Nor that said Ninth Paragraph in said will nor said Eleventh Paragraph thereof, so far as it was meant to effectuate said Ninth Paragraph, were ineffectual to give any property to any of said institutions named in said paragraphs and were invalid and void.

One Hundred and Thirty-seventh.—And that the entire property attempted to be devised and bequeathed to said institutions and to said Ritch, Bulkley and Vaughan, as aforesaid, in fact belonged to said widow and to the next-of-kin of said testator, Daniel B. Fayerweather.

And that said widow and said co-plaintiffs, who are said next-of-kin, when they agreed to so release and when they did so release, not only ignorant of their right to, and interest in, said estate as aforesaid; to wit, to about five-sixths of said estate referred to in said Paragraph
1409 Ninth of said will, and in said first and last codicils thereto;

One Hundred and Thirty-eighth.—But that said Ritch, Bulkley and Vaughan, notwithstanding the fact that they had duly qualified as trustees, as aforesaid, and had sworn to be faithful to their trust;

And that said relation of trustee and beneficiary exists between them and said next-of-kin, as aforesaid;

And that the obligation of perfect good faith and of complete disclosure had arisen between them and said next-of-kin from said existing relation of trust and confidence;

And that said Ritch knew well the respective rights of said widow and said next-of-kin in and to said estate;

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Instead of making to said *cestuis que trustent*, to wit, to said widow and to said next-of-kin, who are co-plaintiffs herein, the fullest disclosure of all material facts in any way affecting their respective rights and interests in said estate, as required by law; and instead of setting those facts forth fully and plainly in said releases as required by law, so that they might have a clear and entire understanding of their said rights and interests.

And instead of the utmost good faith and openness in all their dealings with them; and instead of watching

those interests with jealous care, so that said beneficiaries should be sure to receive all of said estate, to which they were and are entitled by law:

One Hundred and Thirty-ninth.—Said Ritch and Vaughan, with corrupt and evil intent, as aforesaid, kept said widow and said next-of-kin from all knowledge of said rights;

1411 *One Hundred and Fortieth.*—And scrupulously suppressed and concealed from them everything that would even suggest to them that they had any right or interest whatever in said five million dollars' worth of property, or thereabouts, which said Ritch and said Vaughan had so attempted to divert from them, their rightful owners;

One Hundred and Forty-first.—And that not only were said widow and said next-of-kin thus ignorant of their rights in and to said estate, and thus left wholly in the dark by the very custodians of their property, whose duty it was by law to fully and plainly apprise them of those rights;

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One Hundred and Forty-second.—But that, at the time said release was so agreed to be given, and throughout said trial, and for a long period prior thereto, said widow, Lucy Fayerweather, had been ill with diabetes, and had been a great sufferer therefrom; and said malady had assumed so grave a form, and had so undermined her mind and strength, that when said trial came on, so soon after the death of her said husband, Daniel B. Fayerweather, with whom she had lived on terms of devoted and undisturbed affection for nearly fifty years, said malady was so greatly aggravated, not only by her grief at the loss of her husband, but by the incessant and harassing anxiety insep-

arable from such a contest, and by her distrust of the very men on whom her husband had most relied, that she was thereby rendered unfit to at best more than partially and very imperfectly understand and apprehend her rights, even though they had been made known to her with perfect clearness and candor;

And that the tension upon her from this combination of the most depressing circumstances she had ever known, had finally become so great that, with her shattered nerves, and the constant presence of this formidable
1413 malady, which not many months afterwards proved fatal, that tension and anxiety became so unendurable, and brought her to such an enervated and weakened condition that, at the time she agreed to so release, she was totally unfit to understand or deal with large property rights, or to have anything to do with the conduct or management of affairs whatever;

One Hundred and Forty-third.—That said Ritch, and Vaughan, knowing that she was in this condition, not only offered to give her said small increase in annuity, and said sum in cash as aforesaid, if she would agree to so release;

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One Hundred and Forty-fourth.—But, not content with taking advantage of her ignorance, and of her depressed condition, in her hour of deepest grief, that said Vaughan during said trial threatened, in a way that he knew would directly reach her ear, and which did at once reach her ear, that, if she did not withdraw said contest, he would keep that contest in the courts for years;

One Hundred and Forty-fifth.—And that, knowing as he did that said fatal disease had already nearly done its work, he thus threatened to keep her from ever receiving even one dollar of the money which her said husband,

Daniel B. Fayerweather, had so often assured her would be hers, to the extent of one million dollars or upwards;

And that said Vaughan further threatened that, if necessary he would use up said entire estate before he would give up said contest;

And that said Vaughan further threatened that if necessary, he would in addition, use up every dollar of his own private fortune before he would end said contest, or give her any portion of said estate unless she would take such small part thereof as he might see fit to give her.

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One Hundred and Forty-sixth—That said widow, thus broken with grief at her bereavement; suffering with an insidious, painful and incurable malady; and threatened by the man who, of all men, she supposed most worthy of her husband's confidence and her own, and the last one to take advantage of her in her sad plight; that he would render her well nigh penniless, unless she did his will;

Believing too, that he had in his possession abundant means to carry out his threat, to wit, the entire estate of her husband, said Daniel B. Fayerweather, while so long as said contest lasted, she could be, and would
1416 be, prevented by him from getting even one dollar of what was of right her own;

One Hundred and Forty-seventh.—And wholly unaware of her rights to said property, either under said offer, testamentary and codiciliary papers; or under said missing codicil, which said Vaughan had first taken pains to have executed, and then had omitted to offer for probate, and had sworn did not exist;

And unfit and unable to comprehend those rights; and thus threatened by said Vaughan, said widow, Lucy Fayerweather, in the hope of obtaining at least a small remnant of the great fortune which she believed to be her

own; and of enjoying it for the few remaining months of suffering and grief which were to end her life,

Agreed to so release.

One Hundred and Forty-eighth.—Plaintiffs further, on information and belief, allege:

That said widow of said testator, Daniel B. Fayerweather, not only signed said release in ignorance of her rights in and to said estate as aforesaid; and through the failure of said Rich, Bulkley and Vaughan, to give
1417 her the slightest information of what those rights were when said release was wrung from her, in her ignorance, distress and terror as aforesaid:

One Hundred and Forty-ninth.—But that she remained in entire ignorance of her rights in the premises for upwards of one year thereafter, to wit, till about the month of July, 1892, when she was informed of them:

One Hundred and Fiftieth.—That upon so being informed of her said rights, she refused to believe that the information was true, and that it was possible that her husband's trusted friends could have acted as aforesaid; but when her rights assured to her by law, were again made plain to her, she at once directed that pro-
1418 ceedings be taken forthwith to regain that of which she had been thus deprived;

And that she then immediately executed a power of attorney to her sister's husband said John B. Reynolds, duly acknowledged before a proper officer, giving him full authority to do everything in anyway necessary to recover said property, and to direct and secure her said rights and interests:

One Hundred and Fifty-first.—And that very shortly thereafter, under and by direction, through her said attorney, in fact, she entered the action, and on the 11th day of July, 1892, served said defendant Bulkley, with

the summons herein, and invoked the aid of this Court to regain the property of which she had been thus deprived and to wilfully declare void said release and acquiescence, obtained in the manner aforesaid.

One Hundred and Fifty-second.—Plaintiffs further, on information and belief, allege:

That said plaintiffs, Mary W. Achter and Emma S. Fayerweather, nieces of said Daniel Fayerweather, and his said heirs-at-law and next of kin, remained in en-
1419 tire ignorance of their said rights, as aforesaid, and the same were studiously concealed from them by said Ritch and said Vaughan; not only at the time they respectively signed said release;

But until the month of October, 1892; when they were severally informed of their said rights;

One Hundred and Fifty-third.—That immediately upon learning their said rights, and after looking carefully into the matter, they empowered their attorney to enter suit for them, and take all steps needed to regain their said rights, and to recover through the intervention of the Court of Equity, that of which they had been so inequitably deprived as aforesaid;

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And that in response to their sworn petitions on the 1st day of December, 1892, by the order of Justice Truax of this Court, they were joined as parties plaintiff in this action.

One Hundred and Fifty-fourth.—For a further and separate cause of action plaintiffs, on information and belief, allege;

That the said Daniel B. Fayerweather, did not propose or intend, by said first codicil, (of which Exhibit B, is a copy) to devise and bequeath the rest, residue and remain-

der of his estate, real and personal of whatsoever character and wheresoever situated, the same might be, of which he died possessed and remaining after the provisions of the first nine paragraphs of his said will (of which Exhibit A, is a copy) have been fully complied with and carried into effect, to the said defendant Justus L. Baldwin, and to the said Thomas G. Ritch, and to their heirs forever, so that they should take the same, or that the title to the same should vest in them, in their individual capacities, either as joint tenants or otherwise as of their own bene-
1421 ficiary estate; but on the contrary, said Daniel B. Fayerweather did intend that they, as joint-tenants or otherwise, should take the legal title to said residue *as trustees* for the beneficiaries named in said paragraph ninth, of said will of October 6th, 1884, (of which Exhibit A, is a copy), subject to the conditions and limitation of said paragraph ninth more particularly set forth.

One Hundred and Fifty-fifth.—That, in pursuance of said intention said testator did simultaneously with the execution and delivery by him to said Ritch of said last will and testament, and said first codicil, as aforesaid, deliver to the said Ritch two certain paper writings bearing date respectively October 6th, 1884, and December 11th, 1884, a copy of each of which has already been
1422 set forth in this complaint (see Vol. IV p. 22 hereof, and is meant to form a part of this branch of this complaint), the contents of which was known to and approved by testator, and each of which was signed by him, by his own hand; wherein and whereby he did declare to said Ritch and to said Baldwin his said intention, and did refer to the trusts and purposes for which he desired them to take, and as trustees to hold, the said residue of his estate, which said paper writings these plaintiffs are informed and believe are now in the possession or in the control of the defendants, said Ritch and said Baldwin.

One Hundred and Fifty-sixth.—The plaintiffs, further complaining, on information and belief, allege:

That in the proceedings had upon the contest aforesaid in said Surrogate's Court respecting the probate of the said paper writings, the proponents in said contest, to wit: said Ritch, said Bulkley and one Henry B. Vaughan, who are among the defendants in this action, did produce the said paper writings, bearing date respectively October 6th, 1884, and December 11th, 1884, copies of which are set forth as above in this complaint, and the same were put in evidence, and it was then and there proven on oath, by and on behalf of said proponents, that the said
1423 Daniel B. Fayerweather, since deceased, did propose and intend to devise and bequeath the rest, residue and remainder of the estate mentioned in said will and said codicils to the said Thomas G. Ritch, Justus L. Bulkley, Henry B. Vaughan, as trustees upon the trusts or so-called trusts referred to in the said paper writings, to wit, in said two letters hereinbefore set forth, and that said two letters had been delivered by him, the said Daniel B. Fayerweather, to the said Ritch, prior to the decease of said testator, to effectuate said purpose.

One Hundred and Fifty-seventh.—The plaintiffs further, on information and belief, allege:

That said proponents thus contended upon the said contest that they should take and receive the said
1424 residuary estate, purporting to be devised and bequeathed to them by said will and by said codicils, not in their individual capacities as of their own right or estate as joint tenants or otherwise, but solely and wholly *as trustees* under and by virtue of the so-called trusts created and imposed upon them in and by said two letters, dated respectively October 6th, 1884, and December 11th, 1884.

One Hundred and Fifty-eighth.—The plaintiffs further, on information and belief, allege:

That the said two letters are invalid and void as against these plaintiffs, and as against the defendant, Lucy J.

Beardsley, as the representatives of the said widow of the testator, and as the heirs at law and next of kin of Daniel B. Fayerweather, deceased, in so far as they attempted to raise or create any trust, or use, or power in trust over and upon the residuary estate mentioned in, and attempted to be devised and bequeathed in and by the said will and said codicils, in that the same are not in conformity with, but are in violation of the Statutes of New York, for such case particularly made and provided.

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That the dispositions made or attempted or directed to be made of said residuary estate, real and personal, by said two letters are not, nor or any of them, authorized by any of the statutes or laws of the State of New York, relating to the creation of trusts in real and personal property, which said statutes particularly prescribe what trusts shall be valid and declare all others void.

One Hundred and Fifty-ninth.—That the said so-called trusts, and each of them set forth or referred to, in said two letters, are also invalid, and in violation of the statutes for such case made and provided, particularly in this, to wit:

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For that an attempt is made therein and thereby by the last will and testament, and the codicils thereto of a person having a wife, to devise and bequeath to various benevolent, charitable, literary or scientific associations or corporations, more than one-half part of said person's estate, after the payment of his debts.

One Hundred and Sixtieth.—That said will and codicils, and said letters, as to the so-called trust set forth therein, and each of them are among other things, partic-

ularly invalid, and in violation of the statute for such case made and provided, in this, to wit:

For an attempt is made therein and thereby, to give, devise and bequeath, and they do by their terms give, devise and bequeath the entire real and personal property embraced in said residuary estate, to the extent of more than one-half of said estate, to said associations or corporations; and in this, to wit:

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One Hundred and Sixty-first.—For that no provision is made therein that the absolute title to the real estate, or the absolute ownership of the personal property embraced in said residuary estate shall effectually vest in any person competent to take upon the death of the last one of said executors, who may survive the other; and in this, to wit:

One Hundred and Sixty-second.—For that there is not any person now in being who is, or who would become, on the death of the persons pretended in and by said two letters to be appointed as trustees, legally competent to act as their successors, or to succed to the rights, or to the discharge of the powers and duties over said residuary estate in said two letters referred to.

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One Hundred and Sixty-third.—And for that this Court has not any jurisdiction, by statute or otherwise, to appoint any person as such successor, who could lawfully act in the premises in manner as in said two letters described or intended.

One Hundred and Sixty-fourth.—The plaintiffs further complaining, upon information and belief, allege:

That the embodying in the said two letters of October 6th, and December 11th, 1884, of the provisions creating or

attempting to create a trust in said residuary estate, and the attempting to appoint, the said Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, as trustees thereof, in separate unattested papers not to be offered for probate, and by said oral agreement and by the omitting of said provisions from said will and codicils as appears by the first codicil thereto (of which Exhibit B is a copy), certain provisions whereby (so far as was apparent from said wills and said produced codicils) said testator, Daniel B. Fayerweather, did devise and bequeath, or did attempt to
1429 devise and bequeath the said residuary estate absolutely to said Ritch, Bulkley and Vaughan, so that they should take the same and the title thereto, in their individual capacities as joint tenants, or otherwise, were all acts in pursuance of an unlawful plan or design on the part of said Daniel B. Fayerweather, deceased, to evade the statutes of the State of New York, relating to the creation of trusts in real estate and in personal property.

One Hundred and Sixty-fifth.—The plaintiffs further, on information and belief, allege;

That said Daniel B. Fayerweather, at the time of the execution and delivery of said will and said produced codicils, and said two letters, well knew, if the said
1430 provisions as to trusts were contained in his said last will and codicils, or in either of them, that the same would not be upheld, but would be declared unlawful and void, as against the statutes for such cases made and provided in any proper action, wherein the same shall be called in question, and particularly as against these plaintiffs, the said widow and said testator's heirs at law and next of kin.

One Hundred and Sixty-sixth.—Plaintiffs further on information and belief, allege:

That the plan, purpose and intent of the said Daniel B. Fayerweather to make the said three ex-

ecutors trustees as to his said residuary estate, and to create in them a secret trust in relation thereto, while ostensibly and in form and language devising and bequeathing said residuary estate to them absolutely, were well known to said Ritch at the time or times of the execution and delivery of the said will and codicils, and of the said two letters; and said plan, purpose and intent were devised and sanctioned by said Ritch, and were adopted and entered into by the said testator under an agreement or promise on the part of said Ritch,
that he, Ritch, and his co-executors and co-trustees
1431 would accept the said residuary estate, devised and
bequeathed by said will and said first codicil, absolutely, and as if of their own estate, as declared by the terms of said will, and said first codicil; but in truth, and in fact, not absolutely, but *as trustees* under the so-called trusts, and for the purposes declared, or referred to in said letters and in said agreement and promise.

One Hundred and Sixty-seventh.—Plaintiffs further allege that said widow, Lucy Fayerweather, and said heirs-at-law and next of kin, to wit: the said Mary W. Achter, and Emma S. Fayerweather were ignorant of the existence of said two letters, agreement, and promise, and of the fact that said proponents claimed to take and hold
the said residuary estate as trustees upon the terms
1432 in said two letters, agreement and promise, referred
to, until after said proponents had introduced their evidence in support of said will, and until the said will and offered codicils were produced by one of said opponents, to wit, said Ritch, on his examination, and by an associate of his as a witness for contestants, in opposition to said probate, when the said two letters were for the first time disclosed to the plaintiffs, and, as these plaintiffs are informed and believe, were, for the first time, disclosed to any one, or given any publicity whatever.

One Hundred and Sixty-eighth.—The plaintiffs further on information and belief, allege:

That the design and purpose on the part of said Daniel B. Fayerweather, in making said agreement and in executing said paper writings, certain of them to be approved as his last will and codicils thereto, and the others prescribing a totally different disposition of his residuary estate from that prescribed by the said will and said offered codicils, and the aforesaid acts of the defendants, said Ritch, said Bulkley and said Vaughan, to effectuate and carry out the said design and plan were for the illegal object and purpose of evading the statutes of the State
1433 of New York, provided for the creation of trusts in real and and personal property, for devises and bequests to benevolent, literary and other institutions, and prescribing the manner in which said property should be held in trust; and were contrary to public policy; and by reason thereof, the said devise and bequeath of said residuary estate in said will and codicils contained, and the said two letters, and the agreement and promise in connection therewith, are and should be by the decree of this Court, adjudged and decreed to be void.

That said Paragraph Ninth of said will, in that it leaves the disposal of said $2,100,000 to the absolute discretion of said Ritch and Bulkley, and does not require them to exhaust said money on any or on all of the legatees
1434 named in said paragraph; and in that the power in trust given by it is so indefinite that its execution cannot be decreed by any court, is, and should by the decree of this court be adjudged void.

One Hundred and Sixty-ninth.—Plaintiffs further, on information and belief, allege:

That not only did said Ritch and said Vaughan obtain said residue of said estate for themselves, and said Bulkley, in the illegal and wrongful manner aforesaid:

And by the said sacred promise of said Ritch that if all over said estate over and above what was disposed of by the first eight paragraphs of said will and by the

small legacies in said codicils, among said twenty institutions named in Paragraph Ninth of said will, share and share alike;

But on the 24th day of February, 1891, before said wills and said codicils were even probated, ignoring said sacred promise, and without any semblance of authority from said testator, Daniel B. Fayerweather, or from the lawful owners of said property, to wit, said widow and said next-of-kin;

1435

Said Ritch and Bulkley and Vaughan executed said deed of gift (of which a copy is hereto annexed marked Exhibit F), by which, under the pretense of honoring the memory of said testator, but without even pretending that such disposition was either authorized by said testator, or even thought of by him;

And illegally and wrongfully diverted nearly all of said residuary estate to purposes not even referred to in said will, or in any of said produced codicils, and to institutions of some of which said testator knew so little that he was scarcely more than aware of their existence. That testator bequeathed to the Woman's Hospital only $10,000; but said Ritch, Bulkley and Vaughan, by
1436 said deed of gift, without any authority as aforesaid, have given to said Woman's Hospital upwards of $300,000 more.

One Hundreth and Seventieth.—Plaintiffs further, on information and belief, allege:

That each of the institutions named in the summons herein and in the title of this action and mentioned in said will, in said produced codicils, and in said deed of gift, or in any of them, are, and that each of them was at the time of the execution of said will, and of said produced codicils (of which Exhibits A, B, C, D and E, (Vol. IV pp. 183-197) hereto annexed, are copies), organized and incor-

porated for literary and educational purposes under the laws of the respective States where they are respectively located under the names herein above set forth, to wit:

Bowdoin College (at Brunswick, Maine), by and under the laws of the State of Maine;

The Trustees of Dartmouth College (at Hanover, New Hampshire), by and under the laws of the State of New Hampshire;

1437

The President and Trustees of Williams College; the Trustees of Amherst College (at Amherst, Massachusetts); the President and Fellows of Harvard University, by and under the laws of the State of Massachusetts;

Brown University (at Providence, Rhode Island), by and under the laws of the State of Rhode Island;

Wesleyan University (at Middletown, Connecticut); the President and Fellows of Yale College (at New Haven); Trinity College (of Hartford, Connecticut), by and under the laws of the State of Connecticut;

Union Theological Seminary (in the City of New York); Hamilton College (at Clinton, New York); the Uni-
1438 versity of Rochester (at Rochester, New York); Cornell University; the Mt. Sinai Hospital; the Presbyterian Hospital (in the City of New York); the Woman's Hospital (in the State of New York); the Manhattan Eye and Ear Hospital; the New York Eye and Ear Infirmary; the Manhattan Dispensary (at 10th avenue and 131st street, New York); the Montefiore Home for Chronic Invalids; the Methodist Hospital (of Brooklyn, New York); St. Luke's Hospital (in the City of New York); New York Cancer Hospital; the Society of St. Vincent de Paul (in the City of New York); Union College (at Schenectady, New York); the University of the City of New York; Wells College (at Aurora, New York); Elmira Female College;

Vassar College (at Poughkeepsie, New York); Barnard's School for Women (in the City of New York); the Cooper Union for the Advancement of Science and Art; by and under the laws of the State of New York;

Rutgers College (at New Brunswick, New Jersey); Princeton College; by and under the laws of the State of New Jersey;

Haverford College (at Haverford College Post Office, Montgomery County, Pennsylvania); Lincoln Uni-
1439 versity (at Lower Oxford, Pennsylvania); the University of Pennsylvania; Lafayette College (at Easton, Pennsylvania); by and under the laws of the State of Pennsylvania;

Adelbert College of Western Reserve University (at Cleveland, Ohio); Marietta College (at Marietta, Ohio); by and under the laws of the State of Ohio;

Wabash College (at Crawfordsville, Indiana); by and under the laws of the State of Indiana;

The Northwestern University (at Evanston, Illinois); by and under the laws of the State of Illinois;

Shattuck School (at Faribault, Minnesota); by and under the laws of the State of Minnesota;

1440

The Rector and Visitors of the University of Virginia (at Charlottesville, Virginia); the Hampton Normal and Agricultural Institute; by and under the laws of the State of Virginia;

Maryville College (of Maryville, Tennessee); by and under the laws of the State of Tennessee;

Park College (at Parkville, Missouri); by and under the laws of the State of Missouri;

And also said defendants, Anner Amelia Reynolds, Lucy J. Beardsley, and E. M. Upham, each of them;

Claims to have some equitable or other right, title, property or interest in the said residuary estate, and in the property attempted to be bequeathed by said paragraphs ninth and eleventh of said will, which estate and property are the subjects of this action, in and by said will, said offered codicils, and in and by the secret trust so attempted to be created in evasion of the law as aforesaid, or in and by some part thereof.

One Hundred and Seventy-first.—Plaintiffs fur-
1441 ther, on information and belief, allege; that the whole aggregate property of the said defendants, said Ritch, said Bulkley and said Vaughan, is not nearly equal to the amount of the estate of said Daniel B. Fayerweather which so came into there possession as aforesaid;

That they have filed no security therefor whatever.

That at the time of the death of said testator, said Vaughan owed him upwards of five hundred thousand dollars, over one hundred thousand dollars of which still remains unpaid, and unsecured by any collateral of any sort known to plaintiff;

And hence that said estate of said testator, Daniel B. Fayerweather, is not secured as it should be, and as it is required by law.

1442

Plaintiffs hereby offer to restore to said defendants, to wit, said Ritch, said Bulkley, and said Vaughan, said amounts so received by them respectively by and under said agreement to release all and by and under said releases, in case they are held not entitled to retain the same, by the judgment of this Court in this action, together with all legal interest that may be due thereon at the time of such judgment.

Wherefore plaintiffs ask judgment:

First.—That said agreement of said widow and of said co-plaintiffs, said next-of-kin, made with said Ritch, Bulkley and Vaughan to so release their respective rights, title and interest in and to the estate of said Daniel B. Fayerweather, deceased, and the releases executed under said agreement be declared of no effect and void; and that the same be rescinded.

Second.—That said deed of trust dated February 24th, 1891, be declared null and void.

Third.—Declaring and adjudging that said Paragraphs Ninth, Tenth and Eleventh of said will, in so far as
1443 they affect any of said estate attempted to be bequeathed by said paragraph ninth are of no effect and void.

Fourth.—Declaring and adjudging that said plaintiffs Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan are to be held and declared to hold said residue and remainder of said estate mentioned or referred to in said will and said four produced codicils as trustees for the plaintiffs herein, and that said plaintiffs are the owners of said property as *cestuis que* trusts of said defendants as such trustees.

Fifth.—That said Ritch, Bulkley and Vaughan shall fully account for all such property or estate of said
1444 Daniel B. Fayerweather, deceased, as has come to their hands or possession or control, and shall give security for the proper care and management of the same; or in case they do not give such security, that they be removed from their said trust which they claim to so hold as trustees.

That said agreement, said promise, and said two letters dated respectively Oct. 6th, 1884, and December the 11th, 1884, should be construed together with the provisions of the said will and said produced codicils, and that the devise and bequest of said residuary estate, apparently absolute, contained in said will and in said produced codicils, or in any of them, be held invalidated, and be set aside and declared null and void by reason of the unlawful

trusts therewith connected, referred to in said letters, agreement or promise or in any of them.

That all the provisions of said will and said produced codicils relating to said residuary estate, and the said letters, agreement and promise and each of them set aside and declared null and void, by reason that the same were made and delivered pursuant to a plan and design to evade the statutes of the State of New York, relating to the creations and charge of trusts in real and personal property.

1443

Sixth.—That it be adjudged and decided that the said Thomas G. Ritch, Justus L. Buckley and Henry B. Vaughae,* have no individual title, estate, claim, right, property, or interest in said residuary estate, real or personal, or to any of said estate attempted to be bequeathed by said Paragraph Ninth of said will.

And that they do pay over and transfer the same and the whole thereof to these plaintiffs, less said amounts so received by said plaintiffs by and under said agreement to release, and by and under their said respective releases together with legal interest thereon, from the time they received said money till the time of said judgment

1444 and less the portion thereof to which said defendant Lucy J. Beardsley is entitled by law.

Seventh.—That it be further adjudged and decreed that the defendants named in paragraph one hundred and seventieth of this complaint other than Lucy J. Beardsley, Anner Amelia Reynolds and E. M. Upham, have not either of them, any title, estate, claim, right, property or interest in the said property attempted to be bequeathed by said Paragraph Ninth, or in said residuary estate, real, or personal, which is the subject of this action.

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* And also that the legatees named in said Paragraph Ninth.

Eighth.—That a receiver be appointed by this Court to take into his possession the said property attempted to be bequeathed by said Paragraph Ninth, and by said Paragraph Eleventh, of said will; and by said produced codicils so far as they are intended to effectuate said Paragraphs Ninth and Eleventh of said will; and that said receiver so appointed also take into his possession the said residuary estate, real and personal, wherever found, and take all steps necessary to recover and gain possession thereof,

upon filing such bonds for indemnity to the plaintiffs
1445 and to said defendant Lucy J. Beardsley herein as
may be directed and approved by this Court; and to hold the same and the accumulations thereof to abide the event of this action;

And that meanwhile, and until the determination of this action an injunction order issue out of this Court restraining the defendants, Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, individually, and as executors or trustees as aforesaid, from parting with or distributing any portion of the principal of said property so attempted to be bequeathed by said Paragraph Ninth of said will or any portion of the rents, issues or profits thereof; and from parting with or distributing all or any portion

of the principal of said residuary estate, real or
1446 personal, or all or any portion of the rents, issues or
profits, increase accumulations or income thereof to any person or persons other than such receiver as may be appointed by this Court until the final determination of this action;

That the rights of said plaintiffs be fully regulated and protected in the judgment to be entered in this action.

And that the plaintiffs have such further and other relief in the premises as may be just and equitable, with the costs of this action to be paid by said defendants, Ritch, Bulkley and Vaughan, personally.

WILLIAM BLAIKIE,
Plaintiff's Attorney,
206 Broadway, New York.

STATE OF NEW YORK, } ss.:
County of New York, }

JOHN B. REYNOLDS, being duly sworn, says that he is one of the plaintiffs in the above-entitled action; that he has heard read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

1469 (Signed.) JOHN B. REYNOLDS.

Sworn to before me this 6th day of December, 1892. }

CHAS. H. LOTT,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

Exhibit A (Will of Oct. 6th, 1884), above referred to, is in Volume IV ..... page 242
Exhibit B (First Codicil) Vol. IV ..... " 242
" C (Second ") " ..... " 244
" D (Third ") " ..... " 246
" E (Fourth ") " ..... " 246
" F (Deed of Gift) " ..... " 249

1469

Proposed Final Judgment.

(Introduced at page 584.)

N. Y. SUPREME COURT.

THE TRUSTEES OF AMHERST COLLEGE and others

vs.

THOMAS G. RITCH and others.

1451

City and County of New York, ss. :

ALFRED T. CHEGWIDDEN, being duly sworn, deposes and says, that he is a clerk in the office of Putney & Bishop, attorneys for the plaintiffs above named. That on the 30th day of June, 1897, he served the annexed proposed decree and notice upon William Blaikie, Esq., attorney for John B. Reynolds and Maurice B. Beardsley, as executors of the last will and codicil of Lucy Fayerweather, deceased, and for Mary W. Achter and others, by leaving upon the desk of said attorney, at his office,

1452 No. 206 Broadway, in the City of New York, a true copy thereof; said attorney being absent from his office at the time, and there being no one in charge of said attorney's office, the hour being about half past three P. M. And deponent further says that on the 30th day of June, 1897, he served the annexed decree and notice upon Byron L. Winter, Esq., attorney for Anner Amelia Reynolds, by handing to and leaving with the person in charge of said attorney's office a true copy thereof, said attorney being absent at the time, and admission thereof refused. That said attorney's office is at 206 Broadway, in the City of New York. And deponent further says that on the 30th day of June, 1897, at No. 1 Madison avenue, in

the City of New York, he served the annexed decree and notice upon Haley Fiske, Esq., the attorney for the President and Fellows of Yale College, New Haven, Conn., by handing to and leaving with the person in charge of said attorney's office a true copy thereof, said attorney being absent therefrom at the time, the hour being about half-past four.

ALFRED T. CHEGWIDDEN.

Sworn to before me this 1st day of July, 1897.

1453 L. H. PATTERSON,
Notary Public,
New York County.

N Y. SUPREME COURT.

THE TRUSTEES OF AMHERST COLLEGE and others

vs.

THOMAS G. RITCH and others.

1454

Service of a copy of the within proposed decree and notice is hereby admitted.

Dated New York, June 30th, 1897.

PARSONS, SHEPARD & OGDEN,
Attys. for Wabash & Maryville.
WAGER SWAYNE,
Atty. for Lafayette College.
JAMES G. SMITH,
Atty. for Hampton Inst.
CLARK & BROOKS,
Atty. for Park College.

PROPOSED FINAL JUDGMENT.

NEW YORK SUPREME COURT,

THE TRUSTEES OF AMHERST COLLEGE and others

vs.

THOMAS G. RITCH and others.

1455

Service of a copy of the within-proposed decree and notice is hereby admitted.

Dated New York, June 30th, 1897.

ARNOUX, RITCH & WOODFORD,
Attys. for Cornell *et al.*

HORNBLOWER, BYRNE, TAYLOR & MILLER,
Attys. for Lincoln Univ.
30 Broad Street, New York.

ADAMS & COMSTOCK,
Attys. Deft. Union Theol. Semin.

Received copy of this paper on June 30, 1897.

1456

BUTLER, STILLMAN & HUBBARD.

SCOTT & UPSON,
Attys. for Adelbert Coll.

JNO. M. L. NASH,
Atty. for the Trustees of Columbia College.

HORACE RUSSELL,
Attorney for Dartmouth College.

G. G. & F. REYNOLDS,
Attorneys for Wesleyan University.

PROPOSED FINAL JUDGMENT.

NEW YORK SUPREME COURT.

THE TRUSTEE OF AMHERST COLLEGE and others,

vs.

THOMAS G. RITCH and others.

1457

Please to take notice that the annexed is a copy of the decree herein to be presented to Mr Justice Pryor at Special Term, Part III, County Court House, City of New York, on the 2d day of July, at 10.30 A. M. as the decree to be entered on the Referee's report in the above entitled action

Dated New York, June 30, 1897.

Yours, etc.,
PUTNEY & BISHOP,
Attorneys for Plaintiffs,
115 Broadway,
N. Y. City.

1458

To Messrs. BUTLER, STILLMAN & HUBBARD,
Attorneys for the President and Trustees of Bowdoin College, sued in this action under the name of Bowdoin College.

Messrs. ADAMS & COMSTOCK,
Attorneys for the Union Theological Seminary, in the City of New York.

Messrs. ARNOUX, RITCH & WOODFORD,
Attorneys for Cornell University, Marietta College and Elmira College.

Messrs. HORNBLOWER, BYRNE & TAYLOR,
Attorneys for the Lincoln University.

ROBERT C. TAYLOR, Esq.,
Attorney for the Rector and Visitors of the University of Virginia.

JAMES McG. SMITH, Esq.,
Attorney for the Hampton Normal and Agricultural Institute.

Messrs. SCOTT & UPSON,
Attorneys for Adelbert College of the Western Reserve University.

1459

Messrs. ROOT & CLARK,
Attorneys for Dartmouth College.

Messrs. PARSONS, SHEPARD & OGDEN,
Attorneys for Wabash College and Maryville College.

CLARK BROOKS, Esq.,
Attorney for Park College.

HALEY FISKE, Esq.,
Attorneys for the President and Fellows of Yale College, in New Haven, Connecticut.

WAGER SWAYNE, Esq.,
Attorney for Lafayette College.

1460

Messrs. REDDING & KIDDLE,
Attorneys for Northwestern University.

Messrs. G. G. & F. REYNOLDS,
Attorneys for Wesleyan University.

JOHN Mc L. NASH, Esq.,
Attorney for the Trustees of Columbia College in the City of New York.

WILLIAM BLAIKIE, Esq.,
Attorney for John B. Reynolds and Morris B. Beardsley, as executors of the last will and codicil of Lucy Fayerweather, deceased, and for Mary W. Achter *et al.*

BYRAM L. WINTERS, Esq.,
Attorney for Anner Amelia Reynolds.

1461

1462

PROPOSED FINAL JUDGMENT.

At a Special Term of the Supreme Court of the State of New York, held at the County Court House, in the City of New York, on the day of June, 1897.

Present—Hon.

THE TRUSTEES OF AMHERST COLLEGE, The Trustees of Dart-
1464 mouth College, The Trustees of Hamilton College, The University of Rochester, The President and Trustees of Williams College,

Plaintiffs,

vs.

THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN, individually and as Trustees and Executors of the Last Will and Testament and Codicils thereto of Daniel B. Fayerweather, deceased;
1465 Bowdoin College, The Union Theological Seminary in the City of New York, Cornell University, Lincoln University, The Rector and Visitors of the University of Virginia, The Hampton Normal and Agricultural Institute, The Adelbert College of the Western Reserve University, Park College, John B. Reynolds and Morris, B. Beardsley, as Executors of the Last Will and Codicil of Lucy

Fayerweather, deceased; Mary W. Achter, Emma S. Fayerweather, Lucy J. Beardsley, Anner Amelia Reynolds, Northwestern University, The Mt. Sinai Hospital, The Presbyterian Hospital, in the City of New York, The Woman's Hospital in the State of New York, The Manhattan Eye and Ear Hospital, The New York Eye
1466 and Ear Infirmary, the Manhattan Dispensary, in the City of New York; The Montefiore Home for Chronic Invalids, The Methodist Episcopal Hospital in the City of Brooklyn, New York; The New York Cancer Hospital, The St. Vincent's Hospital, in the City of New York; The Trustees of Union College in the Town of Schenectady, in the State of New York; The University of Pennsylvania, The Brown University, of Providence, R. I.; The Presi-
1467 dent and Fellows of Harvard University; Wesleyan University, at Middletown, Conn.; Princeton College, at New Brunswick, N. J.; Wells College, at Aurora, New York; Elmira Female College, Rutgers College, Vassar College, Poughkeepsie, New York; Barnard College, The Peter Cooper Union for the Advancement of Science and Art, The Shattuck School at Faribault, Minnesota; Lafayette College, at Easton, Pa.; Maryville College, Trinity College, at Hartford, Conn;

Wabash College, Marietta College, The President and Fellows of Yale College in the City of New Haven; The St. Luke's Hospital, in the City of New York,

Defendants.

This action having been tried at a Special Term of
1467 this Court, Mr. Justice Truax presiding, held at the City of New York, and a decision having been made and filed herein on the 31st day of December, 1894, and the judgment having been duly entered thereon on the 31st day of December, 1894, in the office of the Clerk of the City and County of New York, by which judgment it was determined and adjudged that the residuary estate devised and bequeathed to the defendants Thomas G. Ritch, Justus L. Bulkley, and Henry B. Vaughan, by the last will and testaments and codicils of Daniel B. Fayerweather, deceased, is held in trust by them for the plaintiffs, to wit: The Trustees of Amherst College, the Trustees of Dartmouth College, the Trustees of Hamilton College, the University of Rochester, the President and Trustees of Williams College, and for the other institutions
1468 named in the ninth paragraph of the said will, to wit: The President and Trustees of Bowdoin College, sued as Bowdoin College; Wesleyan University, the President and Fellows of Yale College, the Trustees of Columbia College, in the City of New York; the Union Theological Seminary, in the City of New York; Cornell University, Lafayette College, Lincoln University, the Rector and Visitors of the University of Virginia, the Hampton Normal and Agricultural Institute, Maryville College, Marietta College, the Adelbert College of the Western Reserve University, sued as Adelbert College. Wabash College and Park

College and for the Northwestern University, upon the trusts therein stated.

And that the said residuary estate is so held by the said defendants in trust to sell and convert the same into cash and to divide the same except that part thereof necessary to provide for the payments mentioned in the third paragraph of the plaintiffs' prayer for relief in the complaint herein as follows: To the Northwestern University $100,000, with its just and equitable proportion of the income, earnings and interest accrued upon the trust
1469 fund as between it and the institutions named in the ninth clause of the will and to each of the said plaintiffs, and to each of the other defendants above named, mentioned in the ninth paragraph of the said will, the remainder thereof in equal parts, and that said defendants Ritch, Bulkley and Vaughan and each of them, their attorneys, agents and servants, be restrained and enjoined from distributing the said residuary estate or any part thereof under the deed of gift mentioned in and annexed to the complaint, except as directed by said judgment, and that the said defendants account for all moneys and property which they have received or to which they became entitled as such residuary legatees under the last will and testament and codicils of the said Daniel B. Fayerweather, deceased, before Charles W. Dayton, Esq., who was
1670 appointed Referee to take and state said accounts, and that out of the sums in the hands of the said defendants Ritch, Bulkley and Vaughan, or for which they are found to be accountable as such residuary legatees, they pay the sum of $100,000 to the Northwestern University, with its just and equitable proportion of the income, earnings and interest accrued upon the trust fund as between it and the institutions named in the ninth clause of the will, and pay over the remainder one-twentieth part thereof to the plaintiff the Trustees of Amherst College; one twentieth part thereof to the plaintiff the Trustees of Hamilton College; one-twentieth part thereto to

the plaintiff the President and Trustees of Williams College; one-twentieth part thereof to the plaintiff the Trustees of Dartmouth College; one-twentieth part thereof to the University of Rochester; one-twentieth part thereof to each of the defendants named in the ninth article of said will, to wit: The President and Trustees of Bowdoin College, Wesleyan University, the President and Fellows of Yale College, the Trustees of Columbia College in the City of New York, the Union Theological Seminary in the City of New York, Cornell University,
1471 Lafayette College, Lincoln University, the Rectors and Visitors of the University of Virginia, the Hampton Normal and Agricultural Institution, Maryville College, Marietta College, the Adelbert College of the Western Reserve University, Wabash College and Park College. And that the plaintiffs recover their costs as therein provided, and that certain costs to be paid to certain of the defendants as therein provided; and the said judgments having been duly affirmed by the General Term of the said Supreme Court by an order and judgment duly made and entered in the office of the Clerk of the City and County of New York, on the 30th day of December, 1895, by which said judgment certain sums were awarded to the plaintiffs and to certain of the defendants as costs, to be paid out of the estate
1472 of the said Daniel B. Fayerweather, deceased, and the said last-named judgment having been duly affirmed by the judgment of the Court of Appeals, which was made the judgment of this Court by an order duly made and entered in the office of the Clerk of the City and County of New York on the day of February, 1897, by which said judgment costs were awarded to the plaintiffs and to each of the defendants who had appeared by separate attorneys.

And the said Charles W. Dayton, Referee named in the said judgment, having on the 16th day of June, 1897, made and filed his report, from which it appears that the residuary estate to which the defendants Ritch, Bulkley

and Vaughan have become entitled under the last will and testament of Daniel B. Fayerweather, deceased, consists as follows:

Cash	$2,031,493 74
Bonds and mortgages	1,044,912 99
Unsold inventoried property, as shown in Schedule B of said account	12,750 00

And in addition thereto, certain leasehold and freehold property, which is set forth in Schedule E of said
1473 account, less certain amounts set forth in said report, that is to say:

(1.) The following amounts unpaid upon legacies left by the eighth clause of the will of the said Daniel B. Fayerweather:

St. Luke's Hospital, N. Y. City	$1,250
Presbyterian Hospital, N. Y	1,250
Manhattan Eye and Ear Infirmary, N. Y. City	1,250
Woman's Hospital, N. Y. City	500
Mt. Sinai Hospital, N. Y. City	500

With interest thereon from February 28, 1892.

(2.) The following amounts unpaid of legacies directed to be paid by the said Daniel B. Fayerweather:

1474

	Principal.	Interest to May 12, 1897.	Principal and Interest to May 12, 1897.
Bowdoin College	$4,750	$4,457 66	$9,207 66
Dartmouth College	4,750	4,445 95	9,195 95
Amherst College	4,750	4,430 34	9,180 34
Wesleyan University	4,750	4,450 68	9,200 68
Yale College	14,250	13,358 90	27,608 90
Columbia College	10,000	10,797 66	20,797 66
Hamilton College	5,000	5,411 35	10,411 35

The University of Rochester.....	5,000	5,958 91	10,958 91
Cornell University..	10,000	10,779 02	20,779 02
Lafayette College...	2,375	2,202 20	4,577 20
Lincoln University..	4,750	4,514 85	9,264 85
The University of Virginia.....	4,750	4,455 31	9,205 31
Hampton University.	4,750	4,441 26	9,191 26
Maryville College...	4,750	4,452 97	9,202 97
Marietta College.....	2,375	2,226 44	4,601 44
Adelbert College...	2,375	2,226 44	4,601 44
Wabash College	2,375	2,226 44	4,601 44
1475 Park College	2,375	2,242 19	4,617 19
Williams College	4,750	4,441 26	9,191 26
Union Theological Seminary.....	2,500	2,708 46	5,208 46
	$101,375	$99,633 33	$200,999 33 $200,999 33

(3.) Any further charges and expenses, including taxes incurred, or to be incurred by the executors until the close of their administration as such.

(4.) The amount unpaid of an annuity of $4,000 a year to the defendant Anner Amelia Reynolds, which has accrued since May 5, 1892, amounting with interest to May 15, 1897, to $22,412.50.

(5.) The sum of $4,166.67, with interest from July 15, 1892, to be paid to the executors of Lucy Fayer-
1476 weather, being the annuity due at the time of her death, with interest thereon.

(6.) The costs of this action, which are to be paid from the estate as specified in the judgments herein before recited.

And it appearing that due notice of the filing of the said report has been duly given to each of the defendants and no exceptions having been filed to the said report, and the time within which exceptions might be filed having expired, except that exceptions have been filed by the plaintiffs and by John B. Reynolds, as sole executor of Lucy Fayerweather, deceased, Mary W. Achter and Emma S. Fayerweather.

PROPOSED FINAL DECREE.

And the said Referee having reported also as to certain other matters material to the determination and distribution of the said residuary estate.

And the said action coming on for hearing and disposition upon motion for judgment, due notice of which has been duly given to all the parties to this action.

And the plaintiffs appearing by Messrs. Putney & Bishop, their attorneys, and Elihu Root, Messrs. 1477 Russell and Martin W. Cooke, as counsel; and the defendants Bulkley and Henry B. Vaughan, individually, and as executors and trustees of Daniel B. Fayerweather, deceased, by their attorneys Messrs. Parsons, Shepard & Ogden. The defendant Thomas G. Hinch, individually and as the executor and trustee of Daniel B. Fayerweather, deceased, by Messrs. Arnoux, Hinch & Woodford, his attorneys. The Trustees of Columbia College, by John McLean Nash, Esq., their attorney. Adelbert College of the Western Reserve University, by Messrs. Smart & Upson, its attorneys. Lincoln University, by Messrs. Hamilton, Ryan & Taylor, its attorneys. Park College by Clarke Brooks, its attorney. The Regents and Visitors of the University of Virginia, by Robert C. Taylor, Esq., their attorney. 1478 The Northwestern University, by Messrs. Rollins & Riddle, its attorneys. Hampton Normal and Agricultural Institute, by J. Hetherington Smith, its attorney. The President and Fellows of Yale College, in New Haven, and the Trustees of Rutgers College, in New Jersey, by Haley Fiske, Esq., their attorney. Barnard College, by Brown & Lathrop, Esqs., its attorneys. John B. Reynolds and Morris B. Beardsley, as executors of the last will and testament of Lucy Fayerweather, deceased, and Mary W. Ashton and Emma S. Fayerweather, by William Bickle, Esq., their attorney. St. Stasi Hospital, by Messrs. Hamlin, Lauterbach & Johnson, its attorneys. The Trustees of Cotton Col-

lege, in the Town of Schenectady, in the State of New York, by Messrs. Chanler, Maxwell & Phillip. The President and Trustees of Bowdoin College, by Messrs. Butler, Stillman & Hubbard, its attorneys. Cornell University and Marietta College and Elmira College by Messrs. Arnoux, Ritch & Woodford, their attorneys. Wabash College, and Maryville College, by Messrs. Parsons, Shepard & Ogden, its attorneys. St. Luke's Hospital, by William Bard McVickar, its attorney. The Presbyterian Hospital, by Messrs. De Forest Bros.

1479

NOW, THEREFORE, on motion of Messrs. Putney & Bishop, attorneys for the plaintiffs, and

IT IS ORDERED, ADJUDGED AND DECREED——

I.—That the report of the said Referee be and hereby is in all things confirmed, except that the exception to an allowance of a double commission on the sum of $648,000 is sustained and such commission, amounting to $20,050, is disallowed.

II. And it is further adjudged and decreed that the funds and property of the estate of Daniel B.
1480 Fayerweather in the hands of the defendants Ritch, Bulkley and Vaughan, as executors of the last will and testament and codicils of Daniel B. Fayerweather, deceased, and as residuary legatees under the will and codicil of the said Daniel B. Fayerweather at the date of the filing of said report, consisted of

Cash	$2,031,493 71
Bonds and mortgages	1,044,912 99
Unsold inventoried property as shown in Schedule E of said account	12,750 00

and the leasehold and freehold property which is set forth in Schedule B of said account.

III.—And it is further adjudged and decreed

That the defendants Ritch, Bulkley and Vaughan distribute the funds and property now remaining in their hands as executors of the last will and testament and codicils of Daniel B. Fayerweather, deceased, and as trustees of the residuary estate of the said Daniel B. Fayerweather, as follows:

(1.) That they pay the amounts unpaid on the legacies given by the eighth paragraph of
1481 said will, to wit, to St. Luke's Hospital, New York City..... ..... $1,250
Presbyterian Hospital, New York City..... 1,250
Manhattan Eye and Ear Infirmary, New York City..... 1,250
Woman's Hospital, New York City 500
Mt. Sinai Hospital, New York City..... 500

with interest on each of said sums from February 28, 1892, so far as the same have not been already paid.

(2.) That they pay the amounts remaining unpaid on the legacies given by the ninth paragraph of said will, to wit:

1482

	Principal.	Interest to May 12, 1897.	Principal and Interest to May 12, 1897.
Bowdoin College....	$4,750	$4,457 66	$9,207 67
Dartmouth College..	4,750	4,445 95	9,195 95
Amherst College....	4,750	4,430 34	9,180 34
Wesleyan University	4,750	4,450 63	9,200 63
Yale College.....	14,250	13,358 90	27,608 90
Columbia College...	10,000	10,797 66	20,797 66
Hamilton College...	5,000	5,411 85	10,411 85
The University of Rochester..... ...	5 000	5,358 91	10,358 91
Cornell University..	10,000	10,779 02	20,779 02
Lafayette College....	2,375	2,202 29	4,577 29

Lincoln University..	4,750	4,514 85	9,264 85	
The University of Virginia.....	4,750	4,455 91	9,205 31	
Hampton University.	4,750	4,441 26	9,191 26	
Maryville College...	4,750	4,452 97	9,202 97	
Marietta College.....	2,375	2,226 44	4,601 44	
Adelbert College....	2,375	2,226 44	4,601 44	
Wabash College.....	2,375	2,226 44	4,601 44	
Park College.....	2,375	2,242 19	4,617 19	
Williams College....	4,750	4,441 26	9,191 26	
Union Theological Seminary...	2,500	2,703 46	5,203 46	
1483	$101,375	$99,623 33	$200,998 33	$200,998 33

so far as the same have not been already paid.

(3.) That they pay to Anner Amelia Reynolds the amounts of her unpaid annuity, to wit, the sum of $22,412.50, with interest from May 15th, 1897, so far as the same have not been already been paid.

(4.) That they pay to John B. Reynolds, as executor of Lucy Fayerweather, deceased, the sum of $4,166.67, the balance due on account of annuity, with interest thereon from July 15th, 1892, so far as the same has not been already paid.

1484

(5.) That they pay the expenses of this accounting, to wit, the Referee's fees, the stenographer's fees and the bill of Horace S. Ely & Co. for appraisal of property, so far as the same has not been already paid.

(6.) That they pay the following costs and allowances as awarded by the judgment entered December 31st, 1894, to the plaintiffs and their atttorneys the sum of $2,540.94.

To John B. Reynolds and Morris B. Beardsley, as executors, and Mary W. Achter and Emma L. Fayerweather, or their attorney, the sum of $1,145.

To Northwestern University or its attorneys, the sum of $186.

To Stephen P. Nash, Esq., $1,000 as an allowance to him as counsel for donees in deed of gift.

Together with interest on each of said sums from December 31, 1894.

And the following costs and allowances awarded by the judgment entered December 30, 1895:

To the Trustees of Amherst College or its attorneys, the sum of $256.

To the Trustees of Dartmouth College, or its attorneys, the sum of $60.

1485

To Hamilton College or its attorneys, the sum of $101.71.

To the University of Rochester or its attorneys, the sum of $70.

To the President and Trustees of Williams College or its attorneys, the sum of $60.

To Wesleyan University or its attorneys at Middletown, Conn., the sum of $60.

To the Union Theological Seminary in the City of New York or its attorneys, the sum of $60.

To Lafayette College at Easton, Pa., or it attorneys, the sum of $60.

1486

To Lincoln University or its attorneys, the sum of $69.55.

To the Rectors and Visitors of the University of Virginia or its attorneys, the sum of $60.

To the Hampton Normal and Agricultural Institute or its attorneys, the sum of $160.

To Adelbert College of the Western Reserve Itstitute or its attorneys, the sum of $60.

To Park College or its attorney, the sum of $60.

To the Northwestern University or its attorneys, the sum of $160.90.

To Marietta College or its attorneys, the sum of $90.50.

To Bowdoin College or its attorneys, the sum of $84.40, together with the interest on each of said sums from December, 30, 1895.

And the following costs awarded by the judgment of the Court of Appeals to the plaintiffs or their attorneys, the sum of $552.90.

To Lincoln College or its attorneys, the sum of $162.80.

To Bowdoin College or its attorneys, the sum of $90.

To the Methodist Episcopal Hospital or its attorneys, the sum of $90.

1487 To the Northwestern University or its attorneys the sum of $271.35.

To Trinity College or its attorneys, $90.

To Wells College or its attorneys, $90.

To the Shattuck School or its attorneys, $90.

To the University of Pennsylvania or its attorneys, $90.

To the President and Fellows of Yale College or its attorneys, $90.

To the Trustees of Columbia College or its attorney, the sum of $90.

To the President and Fellows of Harvard University and Vassar College or their attorneys, $90.

1488 To the Manhattan Eye and Ear Hospital or its attorneys, $90.

To Princeton College or its attorneys, $90.

To St. Luke's Hospital or its attorneys, $90.

To the New York Eye and Ear Hospital or its attorneys, $90.

To the Presbyterian Hospital or its attorneys, $90.

To the University of the City of New York or its attorneys, $90.

To the Women's Hospital or its attorneys, $90.

To the New York Cancer Hospital or its attorneys, $90.

To the Rectors and Visitors of the University of Virginia or its attorneys, $90.

Adelbert College of the Western Reserve University or its attorneys, $90.

To Lafayette College or its attorneys, $90.

To Wesleyan University or its attorneys, $90.

To Park College or its attorneys, $90.

To the Union Theological Seminary or its attorneys, $90.

To the Mt. Sinai Hospital or its attorneys, $90.

1489 To the Montefiore Home or its attorneys, $90.

To the Manhattan Dispensary or its attorneys, $98.05.

To the Barnard College or its attorneys, $385.75.

To Anner Amelia Reynolds or her attorneys, $90.

To Cornell University or its attorneys, $90.

To the Hampton Normal and Agricultural Institute or its attorneys, $90.

To the St. Vincent's Hospital or its attorneys, $90.

To John B. Reynolds, as executor of Lucy Fayerweather, deceased, Mary W. Achter and Emma S. Fayerweather or their attorney, $801.

To Wabash College or its attorneys, $90.

To Maryville College or its attorneys, $90.

1490 IV.—And it is further adjudged and decreed that out of the residuary estate in the hands of the said defendants Ritch, Bulkley and Vaughan, they pay over to either in cash or mortgages as above stated, the sum of $125,000, to be received by said Trust Company upon the following trusts, to wit, to invest the same and to pay over the income thereof to the extent of $4,000 per annum to Anner Amelia Reynolds during the term of her natural life in semi-annual payments, and upon her death to distribute the said sum and the income which

may have accumulated thereon equally between the institutions named in the ninth paragraph of the will of said Daniel B. Fayerweather, share and share alike. Should the income be insufficient to pay the said $4,000, then the deficiency is to be made up out of the principal.

V.—Upon the consent of all the parties hereto it is further adjudged and decreed that the said Ritch, Bulkley and Vaughan expend the sum of $10,000, or so much thereof as may be necessary in repairs to the tomb of
1491 Daniel B. Fayerweather in Woodlawn Cemetery, and that they pay to the Woodlawn Cemetery Association the sum of $2,000 as a fund for the repair of said tomb and the care of the cemetery lot in the future, and that they execute such release, quit claim or conveyance as may be necessary and proper to transfer the interest in said cemetery lot to Lucy J. Beardsley in trust for herself and the heirs and next of kin of the said Daniel B. Fayerweather.

VI.—And it is further adjudged and decreed that out of the balance of the said cash in the hands of the said defendants Ritch, Bulkley and Vaughan they pay to the Northwestern University the sum of $100,000, together with interest thereon at the rate
1492 of five per cent. per annum from November 15th, 1891, up to the date of payment, as their just and equitable proportion of the income, earnings and interest accrued upon the residuary estate as between it and the institutions named in the ninth clause of the will, and that the same be paid within ten days after service of a copy of this decree upon said Ritch, Bulkley & Vaughan, or their attorneys, such payment to be made at the office of the Estate, 38 Park Row, in the City of New York.

VII.—And it is further adjudged and decreed that the balance of the said cash in the hands of the said defendants Ritch, Bulkley and Vaughan be distributed by them at the said office within ten days after service of a copy of

this judgment ratably, as follows: One-twentieth part thereof to the plaintiff Trustees of Amherst College; one-twentieth part thereof to the plaintiff Trustees of Hamilton College; one-twentieth part thereof to the plaintiff The President and Trustees of Williams College; one-twentieth part thereof to the plaintiff the Trustees of Dartmouth College; one-twentieth part thereof to the plaintiff The University of Rochester, and one-twentieth part thereof to each of the defendants named in the ninth article of the said will, to wit: the President and
1493 Trustees of Bowdoin College, Wesleyan University, the President and Fellows of Yale College, the Trustees of Columbia College in the City of New York, the Union Theological Seminary in the City of New York, Cornell University, Lafayette College, Lincoln University, the Rectors and Visitors of the University of Virginia, the Hampton Normal and Agricultural Institution, Maryville College, Marietta College, the Adelbert College of the Western Reserve University, Wabash College and Park College.

VIII.—And it is further adjudged and decreed that the defendants Ritch, Bulkley and Vaughan do proceed with all reasonable dispatch to sell and convert the
1494 unsold personal property set forth in Schedule B of their account and the leasehold and freehold property set forth in Schedule E of their account, and that they collect and get in the mortgages set forth and referred to in the account of the Referee, being the mortgages uncollected and outstanding at the date of the filing of the said report, or sell or otherwise convert them into money, and after payment of any further commissions they may be entitled to and any further charges and expenses, including taxes, incurred or to be incurred by the executors since the filing of their said account to the close of their administration, that they pay over the same to the institutions mentioned in the ninth paragraph of the will, being the institutions named in the

fifth paragraph of the judgment hereinbefore entered and in the seventh paragraph of this judgment, share and share alike, such distribution to be made whenever and as often as the funds in the hands of said Ritch, Bulkley and Vaughan shall amount to $100,000 or upwards.

IX.—It is further adjudged and decreed that upon payment being made by the said Ritch, Bulkley and Vaughan of the various sums hereinbefore directed to be paid by them in the manner hereinbefore provided, the said
1495 Ritch, Bulkley and Vaughan, from and after the making of the said payments, be and they are hereby discharged from all obligation to each of the parties to this action respecting the moneys so paid, and from any obligation to account for the same.

X.—And it is further adjudged and decreed that any party to this action may at any time hereafter apply at the foot of this judgment for such other or further order or direction as may be nececessary to carry out the provisions of this judgment, or to give full effect to the same or to compel or to permit the said Ritch, Bulkley and Vaughan to account for their proceedings subsequent to the filing of the said account.

1496

The opinion as to other colleges than Hamilton, August 27th, 1902, of Lacombe, J., sustaining pleas:

"In whatever way the questions arising in these causes are presented, whether by bill and plea or bill and answer, or cross-bill or plea and answer, the claim preferred by the widow and next-of-kin, or survivors and privies, is
1497 conclusively shut out by the releases, if such releases are valid.

The question is whether or not it was held by the Circuit Court of Appeals to be no longer an open question, because it had been adjudicated in a prior litigation between the same parties or their predecessors.

It is not perceived that the record here, so far as it deals with such prior litigation, is materially different from that on which the Circuit Court of Appeals passed.

The testimony of the State Judge who heard the first cause at Special Term has added nothing; his opinion showed quite as clearly that he did not consider the question whether the releases were, or were not obtained by fraud or misrepresentation.

When the facts are the same, the decision of the Circuit Court of Appeals is controlling here. Whether later
1498 decisions of the State Courts should induce a modification of the principles of law enunciated by the Circuit Court of Appeals, is a question for that Court, not for this.

The several pleas are sustained, and bill and cross-bill dismissed; decrees, appropriate to the situation presented by the pleadings, not in all instances uniform, of the different parties, may be entered on notice."

Opinion of Oct. 7th, 1902, of Lacombe, J., as to form of Final Decree.

Fayerweather *vs.* Ritch.
Reynolds *vs.* Ritch.

LACOMBE, Circuit Judge.

The Appellate Court may as well determine the question of costs, as well as the other questions which appeal will bring up.

1499

The decree will be entered without awarding costs to any one.

The form of decree submitted by the complainants and cross complainants adopted, with modification to eliminate provisions as to costs, and the following additional changes:

(1.) Strike out the word "interlocutory" before "decrees"; when describing the proceedings *in re* Hamilton College. It is thought that it is in fact an interlocutory decree; but it is unnecessary to characterize it.

1500

(2.) Certain defendants, who are in the same position as Lincoln University, except that they didn't move to set aside process, should now have process set aside as to them.

When a form of decree with these changes is submitted, it will be signed.

October 7, 1902.

Final Decree of October 10th, 1902.

At a Stated Term of the Circuit Court of the United States, held in and for the Southern District of New York at the Court House, in the Post Office Building in the Borough of Manhattan, in the City of New York, on the 10th day of October, 1902.

Present—Hon. E. HENRY LACOMBE, Judge.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
1501 Complainants,

against

THOMAS G. RITCH, JUSTUS L. BULKLEY and Henry B. Vaughan, individually and as Trustees and Executors of the Last Will and Testament of Daniel B. Fayerweather, deceased, and of the Codicils thereto; the Trustees of Amherst College, the Trustees of Dartmouth College, the Trustees of
1502 Hamilton College, the University of Rochester, the President and Trustees of Williams College, the President and Trustees of Bowdoin College, the Union Theological Seminary, in the City of New York; Cornell University, Lincoln University, the Rector and Visitors of the University of Virginia, the Hampton Normal and Agricultural Institution, the Adelbert College of the Western Reserve University,

Park College, John B. Reynolds, as sole Executor of the Last Will and Codicil of Lucy Fayerweather, deceased; Lucy J. Beardsley, Anner Amelia Reynolds, North Western University, the Mt. Sinai Hospital, the Presbyterian Hospital, in the City of New York; the
1503 Woman's Hospital in the State of New York; the Manhattan Eye and Ear Hospital, the New York Eye and Ear Infirmary, the Manhattan Dispensary, in the City of New York; the Montefiore Home for Chronic invalids, the Methodist Episcopal Hospital, in the City of Brooklyn, New York; St. Luke's Hospital, in the City of New York; the New York Cancer Hospital, the Society of St. Vincent de Paul, in the City of New York; the Trus-
1504 tees of Union College, in the Town of Schenectady, in the State of New York; Haverford College, at Haverford College Post Office, Montgomery County, Penn.; the University of the City of New York, the University of Pennsylvania, the Brown University, of Providence, R. I.; the President and Fellows of Harvard University, Wesleyan University, at Middletown, Conn.; Princeton College, at New Brunswick, N. J.; Wells Col-

lege, at Aurora, N. Y.; Elmira Female College, Rutgers College, Vassar College, Poughkeepsie, N. Y.; Barnard College, the Peter Cooper Union for the Advancement of Science and Art, the Sherrard School, at Faribault, Minnesota; Lafayette College, at Easton, Pa.; Marysville College, Trinity College, at Hartford, Conn.; Wabash College, Marietta College, the President and Fellows of Yale College, in New Haven, Conn., and the Trustees of Columbia College, in the City of New York,

Defendants.

ANNE E. PAYSON, as Sole Executor of the Last Will and Testament and Codicil of Lucy Payson, deceased,

Cross-complainant,

against

THOMAS G. SHEARMAN, ANDREW L. BURGESS and HENRY B. Vaughn, individually, and as Trustees and Executors of the Last Will and Testament of Daniel B. Payson, deceased, and of the Codicils thereto; EMMA S. Payson, MARY W. ASHTON, ANNIE A. REYNOLDS, LUCY J. BOARDMAN, ANDREW W. PAYN, the Trustees of Amherst College, the Trustees of Dart-

mouth College, the Trustees of Hamilton College, the University of Rochester, the President and Trustees of Bowdoin College, the Union Theological Seminary in the City of New York, Cornell University, the Trustees of Union College in the Town of Schenectady, in the State of New York; the Rector
1507 and Visitors of the University of Virginia, the Hampton Normal and Agricultural Institution, the Adelbert College of the Western Reserve University, Park College, Northwestern University, the Mount Sinai Hospital, the Presbyterian Hospital in the City of New York, the Woman's Hospital in the City of New York, the Manhattan Eye and Ear Infirmary in said city, St. Luke's Hospital in the City of New York,
1508 Wesleyan University at Middletown, Connecticut, Lafayette College at Easton, Pa., Maryville College, Trinity College, at Hartford, Conn., Wabash College, Marietta College, the President and Fellows of Yale College in New Haven, Conn., the Trustees of Columbia College in the City of New York, and the Randolph and Macon College at Boydton, Mecklenburg County, Virginia,

Defendants.

FINAL DECREE.

This cause came on for final hearing upon the complainant's amended bill and the several pleas thereto and supporting answers filed, and, under orders and stipulations heretofore made herein, deemed to have been filed, by the defendants Thomas G. Ritch individually, as trustee, and as executor of the last will and testament of Daniel B. Fayerweather, deceased, and codicils thereto Justus L. Bulkley and Henry B. Vaughan, individually, as trustees, and as executors of the said last will and testament and codicils, Adelbert College of the Western Reserve Univer-
1509 sity, The Trustees of Amherst College, President and Trustees of Bowdoin College, The Trustees of Columbia College in the City of New York, Cornell University, Trustees of Dartmouth College, Lafayette College, Manhattan Eye and Ear Hospital, Marietta College, Mt. Sinai Hospital, Northwestern University, Presbyterian Hospital in the City of New York, University of Rochester, St. Luke's Hospital, Union Theological Seminary, Wesleyan University, The President and Trustees of Williams College, Woman's Hospital in the State of New York, and the President and Fellows of Yale College, and upon the complainant's replications to the said pleas and the testimony, proofs, objections, exceptions, and record of the said complainant's and defendants respectively; and this cause at the same time came on for final hearing also
1510 upon the bill of the cross-complainant, John B. Reynolds, as sole executor of the last will and testament of Lucy Fayerweather, deceased, and the pleas thereto and supporting answers filed, and, under orders and stipulations heretofore made herein, deemed to have been filed, by the defendants Ritch, Bulkley and Vaughan, individually, as trustees, and executors of the said last will and testament and codicils, Adelbert College of the Western Reserve University, The Trustees of Hamilton College, The Trustees of Amherst College, President and Trustees of Bowdoin College, The Trustees of Columbia College in the City of New York,

Cornell University, Trustees of Dartmouth College, Lafayette College, Manhattan Eye and Ear Hospital, Marietta College, University of Rochester, Mt. Sinai Hospital, Northwestern University, Presbyterian Hospital in the City of New York, St. Luke's Hospital, Union Theological Seminary, Wesleyan University, The President and Trustees of Williams College, Woman's Hospital in the State of New York and The President and Fellows of Yale College, and upon the cross-complainant's replications to
1511 the said pleas and the testimony, proofs, objections, exceptions and record of the said cross-complainant and defendant respectively; the defendants Lincoln University, Park College and Hampton Normal and Agricultural Institution, having heretofore obtained orders setting aside the service of process upon them for want of jurisdiction; and the defendant the Trustees of Hamilton College, having heretofore upon its plea to the amended bill of complaint, had a decree, dismissing the said bill; and thereupon counsel were heard for the several parties complainants, cross-complainant and defendants; and the Court after due advisement held and decided that the cause of action alleged in the said bill and that alleged in the cross-bill were barred by an adjudication in a prior litigation between the same parties or their predecessors
1512 or privies; to wit: by the judgment in an action in the Supreme Court of the State of New York, wherein the Trustees of Amherst College and others were plaintiffs, and Thomas G. Ritch and others were defendants; the complainants and cross-complainant having objected to the introduction in evidence of the record thereof, having moved to strike it from the record herein, and to ignore and disregard said judgment, on the ground that the State of New York has by said judgment as an adjudication of the matters herein, each, all, or any of them, deprived them and each of them of property without due process of law, and has denied to them and each of them, the equal protection of the law, whereby said judgment as such adjudication, is null and

void, and said complainants having in their original bill, prayed that said judgment should be treated as null and void for said reasons, and each and all of said objections, contentions and motions having been by the Court overruled and denied, and the Court having held and decided that said judgment is valid, notwithstanding said objections, as, and for the purposes alleged in said pleas; and all the objections taken by the complainants and cross complainant to evidence, orders and proceedings
1513 taken or had therein, and which appear in the record at final hearing being hereby overruled; the other defendants above named having made default;

Now, on motion of the solicitors for the several defendants, it is

ORDERED, ADJUDGED AND DECREED that the said pleas to the said amended bill and each of them be, and the same hereby are, and each of them hereby is, sustained, and that the same amended bill be, and the same hereby is, as to said defendants, dismissed; and it is further

ORDERED, ADJUDGED AND DECREED that the said pleas to the said cross-bill and each of them be, and the same hereby are, and each of them hereby is, sustained, and that the said cross-bill be, and the same hereby
1514 is, as to said defendants, dismissed; and it is further

ORDERED, ADJUDGED AND DECREED that the service of the subpœna herein upon the defendants Maryville College, Wabash College, and Rector and Visitors of the University of Virginia, be, and the same hereby is, as to them, dismissed; and the bills of the complainants and cross-complainant respectively be taken as confessed against those defendants, as to whom this suit is not hereby, or has not heretofore been dismissed, or as to whom service of process has not been, or is not hereby set aside.

The question of costs is hereby reserved, unless an appeal is taken from this decree; and, in case of an appeal, is left to the Appellate Court for determination.

E. HENRY LACOMBE,
U. S. Circuit Judge.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and MARY W. ACHTER, Complainants,

1515 *against*

THOMAS G. RITCH and others, Defendants.

In Equity.

No. 6675.

ASSIGNMENTS OF ERROR OF EMMA S. FAYERWEATHER AND MARY W. ACHTER, COMPLAINANTS.

And now come the complainants, Emma S. Fayerweather and Mary W. Achter, by Roger M. Sherman, their solicitor, and say that, in the proceedings, record and decrees aforesaid, there is manifest error, in this, to wit:

First.—In that the Circuit Court, in the decree dismissing the original bill, filed by these complain-
1516 ants, held and determined that said Circuit Court had no jurisdiction to grant the relief therein prayed, in this, that it held and determined that said Court had no jurisdiction in said cause to entertain the allegations made in said bill and proof in support thereof, which in substance and to the effect alleged that the property involved in said suit was claimed by other parties thereto, under and by a virtue of a decree of probate obtained by false and fraudulent practices upon the parties and the Probate Court; that the will of Daniel B. Fayerweather and its codicils, so probated, were not his Last Will and Testament, but were null and void; that his Last Will and Testament was a certain

paper duly executed, published and declared, on the 2nd day of October, 1880; that probate thereof had been prevented by fraud and contrivance of parties to this suit; that the dealings of the parties defendant with his estate and every part thereof were based upon the probate and the will so probated; that all such dealings and all prior suits and actions, in respect thereto, were vitiated, avoided and null for fraud practiced in and about the procurement of said probate; that the claims of these complainants, in this suit, the counter-claims and defenses of the
1517 other defendants in the premises and the subject-matter of the suit, were affected by, and said allegations and defenses undermined by the said genuine last will of October, 1880, set up by these complainants; that full and equitable disposition of the suit and the rights of the parties could not be had, but by consideration of the matters and things so alleged by these complainants, by the nullification of the probate decree so assailed, and by the establishment of the will set up as the true will by these complainants, and its enforcement as the basis of the rights of the parties, in respect to the subject-matter of this suit.

Second.—In that said Circuit Court in its decree dismissing the bill filed by these complainants, held and determined that said Circuit Court had no juris-
1518 diction to grant the relief prayed in said amended original bill, in so far as it charged, in substance, fraud and contrivance in and about the procurement of the probate of the will of 1884, and its codicils, and prayed that the defendants should be required to answer such allegations; and either for a decree herein that, as between the parties, said probate decree was null and void, or that said defendants or some of them, should be required to go into the Probate Court or some other Court having jurisdiction, and there consent to the vacating of said fraudulent decree, and to the entry of a decree admitting said real last will of said Fayerweather to probate; and to do in any respect what was

equitable in the premises, either in this suit, or by its mandate and decree in some other Court or place.

Third.—In that said Circuit Court rendered its final decree, having possession of the cause and jurisdiction of the parties, establishing an estoppel against these complainants, available in every other Court, confirming the defendants in their title, possession and control of the estate of Daniel B. Fayerweather; nevertheless deciding that it had no jurisdiction to entertain the allega-
1519 tions set up in said amended original bill and proof thereof, which were adequate to impeach such title, possession and control.

Fourth.—In that said Circuit Court decided that it had no jurisdiction to entertain a bill of complaint in any suit between adversary parties, upon a subject-matter of general equitable cognizance, having the requisite diversity of citizenship, for the due disposition of the equities wherein, it became essential to hold a probate decree null and void between the parties, for fraud in and about its procurement; or wherein it became essential to establish a will of realty or of personalty, as the measure or test of right between the parties.

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Fifth.—In that said Circuit Court held and decided that cognizance of the establishment of a will, either of realty or personalty, or the application thereof as a measure of right between the parties, in a suit in equity wherein the requisite diversity of citizenship and grounds therefor exist—does not appertain to said Court.

Sixth.—In that said Court held and decided that a will of realty or personalty can have no effect in a suit in equity, in said Court, in the State of New York, unless it have been previously established by a decree of a probate court.

Seventh.—In that said Court held and decided that cognizance of a will of realty or personalty, not only *ex parte* but *inter partes*, is, under no circumstances, within the jurisdiction of said Court, without probate thereof in a State Court of Probate.

Eighth.—In that said Court held and decided that it could not render any relief upon said amended original bill, inasmuch as it could exercise no probate jurisdiction.

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Ninth.—In that said Court held and decided that it had no jurisdiction to consider any of the allegations of these complainants, inasmuch as certain relief prayed by them involved the establishment of a will, in lieu of that probated, which said Court held it had no power to decree; although the Probate Court, from a defect of power to bring the necessary parties before it, from lapse of time, from being without jurisdiction to exercise equitable powers, or on any other ground, could not, or would not, entertain jurisdiction, to deal with the facts by complainants alleged, and although there were no adequate remedy at law, or in any other Court.

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Tenth.—In that the said Court held and decided that it had no jurisdiction upon the allegations of said amended originall bill to decree that these complainants were under the 1880 will, being the true will of Fayerweather, beneficiaries of a trust, in respect of the realty affected, and entitled to have executed a power of sale by those appointed to take, hold and dispose of the realty for the uses in said will appointed, and for their benefit; and to require the defendants to do what was useful, convenient or necessary by way of account, conveyance and otherwise, to effectuate such trust.

Eleventh.—In that the said Court decided, and it is decreed, that, by the judgments of the Supreme Court of the State of New York in the suit of Amherst College *et al.* against Ritch *et als.* (151 N. Y., 282), as an adjudication of the matters and things in said amended original bill alleged, the State of New York has not deprived said complaints of property without due process of law, and that, thereby, they have not been denied the equal protection of the law.

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Twelfth.—In that the said Court decided that the said judgments of the Supreme Court of the State of New York, and each of them were competent evidence herein, against these complainants, of an adjudication of the matters and things in said amended original bill alleged: and therein said Court overruled the objection of these complainants to said evidence, that, as such adjudication, said judgments, and each of them, deprived them of property without due process of law, and denied them the equal protection of the law.

Thirteenth.—In that said Court decided, and it is decreed, that the judgment of the Supreme Court of the State of New York, in the suit of Amherst College
1524 against Ritch, entered December 31st, 1894, adjudges or concludes the matters and things in the said complainants' amended original bill alleged; and all, every, or any of them.

Fourteenth.—In that said Court decided, and it is decreed, that the judgment of the Supreme Court of the State of New York, in the suit or Amherst College *et al.* against Ritch *et als.*, entered December 30th, 1895, adjudges or concludes the matters or things in the said complainants' amended original bill alleged; and all, every, or any of them.

Fifteenth.—In that said Court decided, and it is decreed, that the judgment of the Supreme Court of the State of New York, in the suit of Amherst College *et al.* against Ritch *et als.*, entered March 10, 1897, adjudges or concludes the matters or things in the said complainants' amended original bill alleged; and all, every, or any of them.

Sixteenth.—In that said Court decided, and it is decreed, that the judgment of the Supreme Court of
1525 the State of New York, in the suit of Amherst College *et al.* against Ritch *et als.*, entered July 6, 1897, adjudges or concludes the matters or things in the said complainants' amended original bill alleged; and all, every, or any of them.

Seventeenth.—In that said Court decided, and it is decreed, that the judgment and order of the Court of Appeals in the suit of Amherst College *et al.* against Ritch *et als.*, entered March 9, 1897, adjudges or concludes the matters or things in the said complainants' amended original bill alleged: and all, every, or any of them.

Eighteenth.—In that said Court decided, and it is decreed, that the judgments and order aforesaid, col-
1526 lectively adjudge or conclude the matters or things in the said complainants' amended original bill alleged; and all, every, or any of them.

Nineteenth.—In that said Court, in the proofs of the defendants Ritch and others (after 6 Q., to the witness Daly) admitted the record on the appeal to the Court of Appeals, in the action of Amherst College against Ritch upon the offer, and under the objection, following:

"*Mr. Parsons.*—We next offer in evidence the record on the appeal to the Court of Appeals; and we are willing to stipulate that, so far as the record embraces the record on the appeal to the General Term, only the record of the Court of Appeals should be so used. We ask to have it

marked." Which should have been excluded because it was duly objected to on the ground that the Supreme Court, at General Term, under pretense of affirming the judgment of the Court below, made and affirmed a judgment not within the pleadings in the action, but in conflict therewith; and that the proceedings thereafter were without jurisdiction and void, including the order and judgment of the General Term; and also as incompetent, irrelevant and immaterial and not within the issues.

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Twentieth.—In that said Court, in the proofs of the defendants Ritch and others (after 6 Q. to the witness Daly) admitted the order described in the offer, and under the objection, following:

"*Mr Parsons.*—We offer in evidence an order, made in that action, bearing date March 10, 1897, made by the Special Term of the Supreme Court, ordering that the judgment of the Court of Appeals be made the judgment of the Supreme Court.

"*Mr. Sherman.*—That is objected to for all the reasons last stated, to wit: Objected to on the ground that the Supreme Court, at General Term, under pretence of affirming the judgment of the Court below, made and
1528 affirmed a judgment not within the pleadings in the action, but in conflict therewith; and that the proceedings thereafter were without jurisdiction and void, including the order and judgment of the General Term; and also incompetent, irrelevant and immaterial and not within the issues."

Twenty-first.—In that said Court, in the proof of the defendants Ritch and others (after 6 Q. to the witness Daly) admitted the judgment-roll; the judgment entered upon the decision of the General Term; the appeal to the Court of Appeals; the remittitur thereof; the papers upon a motion to amend the remittitur; the order upon that mo-

tion, and the final judgment in the action of Amherst College *et al.* against Ritch *et als.*, upon the offer, and against the objection, following:

"*Mr. Parsons.*—The papers that we offer, in addition to those which have been previously offered, are the judgment-roll in the Amherst College suit, including the judgment entered on the decision of the General Term; the appeal to the Court of Appeals; the remittitur of that Court, and the papers on the motion to amend the remittitur and for a reargument; the order of the Court of Ap-
1529 peals upon that motion; the order of the Special Term already marked, making the decision of the Court of Appeals the judgment of the Supreme Court; and the final judgment entered in the action."

"*Mr. Sherman.*—Each, every and all of them are objected to, for the reasons last stated in full, to wit: Objected to on the ground that the Supreme Court, at General Term, under pretence of affirming the judgment of the Court below, made and affirmed a judgment not within the pleadings in the action, but in conflict therewith; and that the proceedings thereafter were without jurisdiction and void, including the order and judgment of the General Term; and also incompetent, irrelevant and immaterial, and not within the issues."

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Twenty-second.—In that said Court, in the proofs of the defendants Ritch and others, question 220 Q., to John B. Reynolds, a witness called by defendants,—allowed the question, referring to letters written to Mrs. Fayerweather by her attorneys, against the objection, following:

220 Q. "Have not turned over to whom?

"*Mr. Sherman.*—Counsel for complainants objects to this whole line of examination, and to the present question, on the ground that, in order to have the benefit of their pleas, as pleas, these defendants must confine their

proceedings thereunder to the issues raised thereby; and that the object of their pleas being, to avoid going into the evidence at large, the defendants, by going into evidence at large, outside of the issues raised by their pleas, waive their pleas; and can have no advantage from their pleas, except as answers; and counsel for complainants hereby give notice to the defendants that the complainants will, at all times, insist that the defendants have, by that, waived their pleas; and that any further testi-
1581 mony, outside of the issues raised by the pleas, will likewise be insisted upon to have worked the effect above stated."

Twenty-third.—In that said Court, in the proofs of the defendants Kitch and others, question 227 Q. to said witness, referring to Mrs. Fayerweather's papers mentioned in a certain *subpœna duces tecum*, served upon said witness by said defendants, allowed the question, against the objection, following:

227 Q. "What did you produce?

"*Mr. Harmon.*—Objected to, on the ground that the defendants, so far from observing the rule respecting the taking of testimony under a plea, so far from observing the principle that the object of a plea is to prevent
1582 the delay and expense of taking testimony at large, are not only taking their testimony at large, but are employing the time of the parties in inquiring into wholly immaterial explanations, or proving [illegible] physical facts, according to their own observation; and thereby offending every principle which authorizes the introduction of a plea in an equity suit."

Twenty-fourth.—In that said Court, in the proofs of the defendants Kitch and others, 267 Q. to said witness, allowed the question referring to letters written to Mrs. Fayerweather by her attorneys, against the objection, following: "267 Q. Have you done what Judge Lacombe said you must do?

[illegible]

Mr. Stevens.—Objected to on the ground that no session, opportunity, or request, pursuant to the Judge's order, has been made; that it is not self-operative; but against some request in order to act it is useless; and, therefore, it is obvious that the witness has not done, what he has not been called upon to do; and I do not see any objection that I did before, as to the effect of the course of the defendants, in travelling outside of the issues raised by the pleas, and taking evidence at large in the cause; [illegible] and again notify it—that I will insist upon that construction of [illegible] order, and to all intents on appeal."

Examination.—In what mail (Court), to the credit of the defendants, [illegible] and others, did [illegible], or any evidence, object the question against the objection, following [illegible] "Is the course which has been adopted by you under Judge Lavender's order taken by you under the advice of counsel; have they advised you to do what you have done and to abstain from doing what you have not?"

Mr. Stevens.—Objected to, on the ground that these defendants first interposed, to the bill of complaint herein, a demurrer; that the demurrer was overruled by Judge Wheeler, after six months' consideration; that these defendants thereupon answered and subsequently [illegible] obtained leave from the Court to withdraw their answer, and to file pleas, upon the previous [illegible] that the case was heard by said pleas, and long ago only the effect of the alleged application of the matters propounded by the bill, by virtue of judgment in the so-called Ohio Gaslight action; that, in obtaining leave to rely upon said pleas these defendants promised and represented to the Court, that they ought to be allowed so to plead, as a matter of [illegible] and have being settled as to the [illegible] matter of right; because [illegible] would be oppressive, [illegible] and unjustice to compel the litigants to go into the evidence at large; and upon that promise and [illegible], and upon that plea, they were allowed to do and plead;

that the matters which have been inquired of, by the examination of this witness, have been entirely outside, and unrelated to any question presented by the pleas, as to existence, or effect, or validity of the adjudication of the Five Colleges' action; but have been addressed so far as they had any legal tendency whatever, to show some estoppel against the widow of Daniel B. Fayerweather; and as against the complainants in the original bill; by virtue of facts alleged or claimed to have been communicated to them through the medium of their own
1535 counsel; that the counsel for the defendants have now occupied an hour and a half, in a course of questioning of this witness, oppressive, immaterial, frivolous, and obviously leading nowhere; for the purpose of oppressing the complainants with the worst features of examination into the evidence at large in the cause; contrary to every principle in equity; contrary to the 67th Rule; and contrary to the limit afforded these defendants, by virtue of their pleas; and thereupon the complainants again repeat their protest, and claim and insist that the pleas are to be taken as answers; and are waived as pleas; and are overruled by the testimony taken under them; and that the matter is at large, without reference to the pleas; and that, therefore, this present question is incompetent, irrelevant and immaterial."

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Twenty-sixth.—In that said Court, in the proofs of the defendants, Ritch and others, 501 R-D Q., to said witness, allowed the question against the objection following:

"501 R-D-Q How much did she receive from Mrs. Fayerweather, before she died?

"*Mr. Sherman.*—Objected to, on the ground that this witness was called by the defendants; that the present inquiry does not relate to any matter, touched upon or alluded to, upon the cross examination; and is, therefore, not redirect examination; that, under the pretense of re-

direct examination, under a protest that the cross-examination was irrelevant, the counsel for the defendants are now going into new matter in chief, which is entirely outside any issue raised by any pleas, and not even competent evidence at large; upon any topic presented by the bill or cross-bill; and counsel for complainants gives the counsel for the defendants notice, that he will at all times and places, insist that, by the inquiry into such topics, under such circumstances, the defendants have waived their pleas; and overruled their pleas and intro-
1537 duced evidence at large in the cause. And I make the further objection, that the only matter which is pertinent here, is what disposition was made of an estate of six millions of dollars, of which Daniel B. Fayerweather was robbed in his lifetime, or at his death; and the property now inquired about, having been conceded to be the property of the persons, whose disposition of it is now subjected to inquiry, by counsel for the defendants."

Twenty-seventh.—In that said Court, in the proofs of the derendants Ritch and others, 56 Q. to Edward M. Grout, a witness called by said defendants, allowed the question against the objection, following:

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56 Q. "What would you say, Mr. Grout, as to Mr. Fayerweather being under undue influence at that time?

"*Mr. Blaikie.*—Objected to as calling for a conclusion: and no foundation laid, and incompetent."

Twenty-eighth.—In that said Court, in the proofs of the defendants, Ritch and others, 60 Q. to said witness, allowed the question against the objection, following:

60 Q. "In your opinion, was he competent to execute the paper, physically and mentally?

"*Mr Blaikie.*—Objected to as incompetent, and immaterial."

Twenty-ninth.—In that said Court, in the proofs of the defendants, Ritch and others, 61 Q. to said witness, allowed the question against the objection, following:

61 Q. "Was he of sound mind and memory?

"*Mr. Blaikie.*—Objected to as incompetent, and immaterial."

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Thirtieth.—In that said Court, in the proofs of the defendants Ritch and others, admitted in evidence the deposition of Hon. Alton B. Parker, at the session of May 15, 1902, against the objection following:

"*Mr. Blaikie.*—Counsel for complainants, and cross-complainant, objects to the introduction of the testimony of this witness, Judge Parker; because not given upon legal notice; and not complying with the requirements and rules of practice of this Court, against the introduction at this stage; and also further protest that the examination of this witness, as to his reasons for reaching a conclusion in this case, or as to anything that moved
1540 him to testify as he did, is illegal; is contrary to the rules and practice of this Court; is disrespectful to the witness himself; and being evidence at large in the case, it overrules the pleas of all defendants. And further, that nothing, drawn out in his testimony, justifies such a course, upon the part of the defendants. He further objects to his testimony as to what transpired at the argument in the State Court, before the General Term in the Five College action, as not the best evidence, and as incompetent; and further objects to what he attempts to testify as to the contents of any brief or briefs, upon the complainants' side, as not the best evidence: and as incompetent."

Thirty-first.—In that said Court, in the cross examination of the complainant Emma S. Fayerweather, allowed the defendants to go into evidence at large in the cause, upon the issues not presented by their pleas, as follows:

587 X-Q. "Miss Fayetweather, I want to give you the opportunity of stating what is your best recollection, upon the subject of how information, about the deed or gift, came to you; whether it came to you while you were in New York; or whether it came to you shortly after
1541 your return; and, in the latter case, whether it must have come to you by letter?"

Which question should have been excluded, because it was duly objected to, on the ground that the witness, not having requested any opportunity, there is no occasion for the inquiry; and that it has been already fully answered; also on the ground that it is evidence at large in the cause; and the legal effect of introducing evidence at large in the cause by these defendants, the complainants will now and at all times insist upon.

Thirty-second.—In that said Court, in the cross examination of the complainants' witness, Elizabeth L. Goodwin, allowed the defendants to go into evidence at large in the cause, upon issues not presented by their pleas, as follows:

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232 X-Q. "When did you first see Mr. Reynolds in the household of Mrs. Fayerweather?

"*Mr. Sherman.*—Objected to as not cross examination, but independent evidence in chief at large in the cause; and the counsel for the complainants contends that, by this course of examination, the defendants overruled their plea; and raise all the issues which can be raised, under these veral bills of complaint."

Thirty-third.—In that said Court, in the cross examination of the complainants' witness Goodwin, allowed the

defendants to go into the evidence at large in the cause, upon issues not presented by their pleas, as follows:

236 X-Q. "Was the marriage of Mr. Reynolds to Miss Joyce before, or after the occurrences, to which you have testified upon your examination by counsel for complainants?"

Which question should have been excluded, because it was duly objected to, as not cross examination, but as evidence at large in the cause.

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Thirty-fourth.—In that said Court, in the cross examination of John E. Parsons, a hostile witness, allowed the defendants to go into evidence at large, in the cause, upon issues not presented by their pleas, as follows:

408 X-Q. "Please to state what was the position taken by Mr. Coudert, representing Mrs. Fayerweather; and Judge Rollins, representing the nieces?"

Which question should have been excluded, because it was duly objected to, on the ground that the position taken by the counsel mentioned will appear in the record; that it already appears that the position they took was taken without full knowledge of the facts, and in
1544 ignorance of the facts; and upon being misled by false representations of fact; and the concealment of material facts, represented to them not to exist; and because the opinion of adverse counsel, as to the contentions made by opposing counsel, is the worst evidence that can be conceived of to establish that proposition.

Thirty-fifth.—In that said Court, in the cross examination of John E. Parsons, a hostile witness, allowed the defendants to go into evidence at large, in the cause, upon issues not presented by their pleas, as follows:

416 X-Q. "By whom was the case, of Mrs. Fayerweathers executor and next-of-kin, presented in the argument at the General Term?"

Which question should have been excluded, because it was duly objected to as being immaterial; and on the further ground that this is not cross examination of any matter inquired of in chief, either *de bene esse*, or any other kind of cross examination; and as new matter; whereupon the complainants insist that the defendants, by giving evidence at large in the cause in this matter, have overruled their plea.

Thirty-sixth.—In that said Court, in the cross
1545 examination of John E. Parsons, a hostile witness, allowed the defendants to go into evidence at large, in the cause, upon issues not presented by their pleas, as follows:

420 X-Q. "What was the position taken by the gentleman, purporting to represent the widow's executor and next-of-kin, upon the trial of that case?"

Which question should have been excluded, because it was duly objected to as being incompetent, irrelevant, immaterial; not cross examination as to any matter inquired of in chief; because the record is the best evidence; and because this is evidence at large in the cause, and hence overrules the pleas.

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Thirty-seventh.—In that the Court allowed the question, upon cross examination of John E. Parsons, a hostile witness, following:

421 X-Q. "Mr. Parsons, in answer to question 17, you gave this testimony: 'The persons referred to were represented by most competent counsel, Judge Rollins and Mr. Coudert. Those gentlemen were, as I assumed, as I believed, fully possessed of all information bearing upon the subject; and I have every reason to suppose that in the discharge of their duty they communicated to their clients such information as they had, upon which subject I know nothing.'"

There was a motion made after that answer to strike out, as not responsive. "I wish you would state whether or not Messrs. Coudert or Rollins, so far as you know, were possessed of all information bearing upon the subject?"

Which question should have been excluded, because it was duly objected to, on the ground that the question involves the opinion of the witness, or the conclusion of the witness, of what the subject was; of what evidence bore upon it; and as to what Messrs. Coudert and Rol-
1547 lins had, or had not, in their possession, or knowledge; as incompetent; as evidence at large in the cause; and on the ground that the question should have a tendency to elicit the facts, from which the Court can draw the inference, embodied in the question.

Thirty-eighth.—In that the Court allowed the question, upon cross examination of John E. Parsons, a hostile witness, following:

429 X-Q. "Mr. Parsons, this examination is with reference to matters to which you have testified, which the counsel for the complainants moved to strike out, brought out by the direct examination. In answer to question 194, you stated, after referring to the deed of gift and the beneficiaries named therein, 'I have always understood
1548 that it met with the approval of Mrs. Fayerweather; at all events, I never heard anything to the contrary'. What understanding did you have, up to that time, with reference to the instrument being approved by Mrs. Fayerweather?"

Which question should have been excluded, because it was duly objected to, as calling for conclusions of the witness; and not for any fact which can be relevant or competent here; as evidence at large in the cause; and not cross examination; that the basis for the alleged cross examination consists of answers, forced upon the complainants, not responsive to their questions; at which they protested at the time; and moved to strike out.

Thirty-ninth.—In that the Court allowed the question, upon cross examination of John E. Parsons, a hostile witness, following:

431 X-Q. "At the time that you had those conversations, did Mr. Coudert know of the conversations between Mr. Vaughan and Mr. Fayerweather, of which Exhibit Oa was a memorandum?"

Which question should have been excluded, because it was duly objected to, as involving the conclusion of the witness; as not the proper mode of proof of what
1549 Mr. Coudert does, or does not, know; because, it appears from the testimony of the witness, that Mr. Coudert knew nothing about Exhibit Oa, until it was produced in the Five College trial; and as incompetent, irrelevant and immaterial; and as evidence at large in the cause.

Said question was then answered thus:

"A. My recollection is that the pencil-memorandum on the envelope, which subsequently, upon the Trnax trial, became marked Exhibit Oa, related to what passed between Mr. Fayerweather and Mr. Vaughan on November 15th, 1890. Mr. Vaughan testified that, in that conversation—testified upon the probate-contest, that in that
1547 conversation, there did occur what the memorandum indicated. The memorandum of itself showed nothing, other than a statement of subjects. Mr. Vaughan testified to the conversation itself. I wish to say of recollection, as well as part of the record of the contest-trial, that what then occurred, informed Mr. Coudert fully of that conversation, so far as I had any knowledge or information about it then; or have ever had such knowledge or information since; and the suggestion or any suggestion, by anybody that Mr. Coudert made the settlement, in ignorance upon that subject, is absolutely untrue, and has no shadow of foundation."

Which answer should have been stricken out, because a motion therefor was duly made thus:

"*Mr. Sherman.*—I move to strike the answer out as not responsive; as involving the conclusions and opinions of the witness; as a contradiction of the record in the Five College action; and as a contradiction of the record in the Surrogate's contest:

Fortieth.—In that the Court allowed the answer to stand upon cross examination of John E. Parsons, an adverse witness, following:

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432 X-Q. "What, if anything, did you have to do with fixing the fees of Coudert and Rollins in that contest? A. Absolutely nothing. I learned at the time, and I think from Mr. Coudert, what was his charge and what was the charge of Judge Rollins. My impression would be, and I think I recall, the way in which it came about was in the wish to have checks arranged. I think that Mr. Coudert said that it was the the wish of his clients that there should be separate checks. Whether there were separate checks in the end, or not, I do not recall."

Which answer should have been stricken out, because motion was duly made thus: "I move to strike out the answer after the first sentence as not responsive and as incompetent."

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Forty-first.—In that the Court overruled the objection, and denied the contention, made by counsel for complainants, upon the question addressed to the complainant, Emma S. Fayerweather, under cross examination, following:

382 X-Q. (Handing paper.) "Look at the paper which I now show you, and tell me if you recognize that as the complaint in that action?"

Which question should have been excluded, because it was duly objected to as follows:

"*Mr. Sherman.*—Counselfor the complainants objects to the protracted examination which has occurred at the instance of counsel for the defendants, of matters having no relevancy whatever to the special plea, and which, if they have any legal tendency, relate to matters at large in the case; and which have no possible excuse or pretext in a *de bene esse* or provisional cross-examination, inasmuch as those matters have not been inquired of in chief; and insists that the defendants, having availed themselves of this opportunity to exploit the case of the com-
1553 plainants at large, shall hereafter be held to the strict rule in regard to the proof at large in the cause, after having filed a plea; and shall not be permitted after exploiting the complainant's case to strike out the evidence upon the pretext that it was provisional cross-examination; but insists that hereafter and that at all times and places the defendants shall be held to the legal rule, that they have overruled their plea by going into evidence at large with full notice; and that they are entitled to no benefit from the proof at large, inasmuch as it is not responsive to any pleading filed by them."

Forty-second.—In that the Court overruled the objection to the question asked by defendants of the
1554 complainant, Emma S. Fayerweather, upon her cross-examination, following:

575 X-Q. "Did such a letter, so far as you know or were informed, come to Mrs. Achter?"

Which question should have been excluded, because it was duly objected to as being immaterial, on the ground that the writing of any such letter, if any such were written, is a crime; that it is in violation of the Penal Code, and of the Statutes of the United States, inasmuch as the attempt to intimidate or influence the parties to a pending action by threats is a crime; on the ground that it is evidence at large in this case; that it has no relation to any of the issues in this case: and that it is obviously

brought to the attention of the witness at this time for the purpose of, and in pursuance of a clear plan, observable throughout the course taken by the defendants herein, to intimidate and bully and annoy the complainants.

Forty-third.—In that the Circuit Court did not, upon final hearing, treat the cause as one upon bill, pleas which stood for answer, replication thereto, and proofs, but treated the cause as presented upon bill, pleas, replication and proof; and thereupon decided that the pleas
1555 were a bar to all the matters in the amended, original bill alleged, set up and propounded; and rendered a decree thereupon dismissing the said bill upon the merits; whereas the Court should have decided that said pleas were disproved; and have awarded complainants a decree upon bill, answer and replication upon the merits, sustaining the allegations and prayers of their said bill, with suitable provisions to effectuate the same.

Forty-fourth.—In that the Circuit Court should have decided that the defendants, and each of them, had, by the form of their pleas, and the introduction of evidence, at large, outside the issues presented thereby, overruled their pleas; so that the cause was properly before the Court for final hearing upon the merits.

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Forty-fifth.—In that the decree should have been in favor of the complainants and against the defendants interposing pleas and each of them, upon the truth of their pleas.

Forty-sixth.—In that the decree should have been in favor of the complainants, and against the defendants and each of them interposing pleas upon the sufficiency of their pleas to bar the matters alleged in the amended original bill, or any of them.

Forty-seventh.—In that the Circuit Court held the proceedings, upon the appeal of the witness, Prescott Hall Butler, whereby the decision of the Circuit Court, requiring said witness to answer concerning the contents of the codicil drawn by him, was reversed by the Circuit Court of Appeals, to be valid and binding upon said Circuit Court; whereas said proceedings were unauthorized by law; and without jurisdiction.

Forty-eighth.—In that said Circuit Court held
1557 that its decision and order determining that the witness, Prescott Hall Butler, was in contempt for his refusal to answer the questions propounded to him, respecting the contents of a certain codicil to the will of Daniel B. Fayerweather, drawn by said Butler, and unlawfully destroyed, by the defendant, Vaughan—was lawfully or effectively reversed by the mandate of the Circuit Court of Appeals, made upon a writ of error sued out by said Butler; inasmuch as said writ of error was null, void, and of no force or effect; and the said mandate was not issued in pursuance of any jurisdiction, power, or authority.

Forty-ninth.—In that the said Circuit Court overruled the objections, made by complainants to the introduction,
under the pleas of the Trustees of Hamilton Col-
1558 lege, and those defendants in like case with them, of the record in the Trustees of Amherst College against Ritch; so far as it contained proofs, or evidence, or matters outside the judgment roll.

Fiftieth.—In that the said Circuit Court overruled the contention made by complainants, that the introduction, under the plea of the Trustees of Hamilton College, and those defendants in like case with them, by said defendants, of the proofs and evidence and of matters outside the judgment roll in the suit of the Trustees of Amherst College *et al*, against Ritch, *et als.*, including the briefs presented to the State Court by the attorneys and counsel

for these complainants, in that action, was evidence at large in this cause; not responsive to the issues presented to the pleas, tending to support a defense not pleaded; and in not thereupon overruling said pleas, depriving said defendants of the advantage of the pleas, and in not holding that the record presented a case upon bill, answer, and replication, and therefore requiring a final decree upon the merits.

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Fifty-first.—In that the said Circuit Court decided that the issues presented by the amendment to the original bill, made no essential change, as against the pleas, from the issues presented by the original bill before amendment.

Fifty-second.—In that said Circuit Court held that it was constrained to its said decree, against its own judgment, by operation of a certain decision or opinion given in the Circuit Court of Appeals, upon appeal herein from an order reversing its order of injunction herein; which said decision was rendered upon an interlocutory appeal, upon a record made up of affidavits, wherein these appellants had no opportunity of cross-examination of witnesses;

1560 and which decision further assumed to overrule the solemnly declared law of the case in favor of the complainants and its interlocutory decree thereon overruling demurrers to the bill; which said decree was not before the Circuit Court of Appeals for review; whereby that Court assumed beyond its powers and established practice, indirectly to reverse a solemn decision in favor of complainants, upon the equity of the bill, which that Court had no jurisdiction to do by a direct appeal; wherein the Circuit Court of Appeals ignored and disregarded its obligation, as well as the obligation of the Circuit Court, to treat the solemn judgment, upon demurrer to the bill, as the law of the case, until it should be directly reversed upon appeal from a final decree; and to conform all incidental features of the case, and particularly an injunction *pendente lite* thereto.

So that the complainants were subjected to the imposition of costs, by an assumption of power by the said Circuit Court of Appeals, upon the reversal of said injunction order; and the decision so made was no restraint upon the power, or bar to the propriety, of the decision by the Circuit Court, and an award of a final decree in favor of complainants, in conformity with the expressed opinion of the said Circuit Court, and of two of its Judges, that the complainants were entitled to a decree in their favor.

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Fifty-third.—In that the said Circuit Court, held by the Honorable E. Henry Lacombe, decided that pursuant to the due and orderly practice in equity, it was not required to follow the decision and decree overruling the demurrer to the original bill, made by the Court, held by the Honorable Hoyt H. Wheeler, the convictions of the said Court being unchanged; and that said Circuit Court was constrained by the decision of the Circuit Court of Appeals, held by the Honorable William J. Wallace and the Honorable Nathaniel Shipman, upon appeal from an interlocutory injunction order made by the Honorable E. Henry Lacombe, to overrule and disregard the said decree, overruling the demurrers.

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Fifty fourth.—In that said Circuit Court held that the matters adjudged by the State Court, or any of them, in the case of the Trustees of Amherst College against Ritch, were the same matters presented by the amended original bill.

Fifty-fifth.—In that said Circuit Court held that the releases alleged in the pleas were available as a bar to the prayer of complainants, upon allegations impeaching the capacity of the persons to whom said releases ran.

Fifty-sixth.—In that said Circuit Court held that the releases pleaded by the defendants were a bar, as to matters, which impugned their fairness and good faith, arising, and disclosed, and known to complainants, after the execution and delivery of said releases; and theretofore by the fraud and contrivance of the defendants, concealed from complainants; so that said releases were construed to apply to bar the right of complainants to assert their statutory interest against the secret trust affecting the residuary estate, notwithstanding that the exist-
1563 ence of that trust was concealed from complainants, and fraudulently denied by the defendants, before, and in the very act of procuring said releases.

Fifty-seventh.—In that said Circuit Court held that the releases of the complainants were authorized, or pursued the authority under which they purport to have been executed; and held that, by the estoppel of the judgment in the case of Amherst *v.* Ritch, the evidence taken therein, of facts theretofore unknown to, and, by the contrivance of the defendants, fraudulently concealed from the complainants that the person who signed the releases under the said authority, was corrupted by the defendants and induced to betray the interests of said com-
1564 plainants, and to abuse his said authority; could have no effect herein.

Fifty-eighth—In that said Circuit Court held that the allegations of the original, amended bill, and the proof in support thereof impeaching the probate of the will under which the defendants claimed, do not amount to and were not based upon a new title or newly-discovered evidence, available in this cause, notwithstanding any adjudication, either by the decree of probate or the judgment in the case of the Trustees of Amherst College against Ritch.

Fifty-ninth.—In that said Circuit Court held that the allegations of the amended, original bill, impeaching the

releases set up by the defendants, and the proofs in support thereof, do not amount to, and were not based upon, a new title or newly-discovered evidence, available in this cause, notwithstanding any adjudication, either by the decree of probate, or the judgments in the case of the Trustees of Amherst College against Ritch.

Sixtieth.—In that said Circuit Court held that by the judgment in the case of the Trustees of Amherst College against Ritch, or some of them, the validity of the
1565 releases attacked and asserted by the pleas, as against the allegations of the amended, original bill, had been adjudicated, sustained, passed upon, or considered, by the State Court.

Sixty-first.—In that said Circuit Court held that the releases attacked by the amended, original bill were valid.

Sixty-second.—In that said Circuit Court held that the releases attacked by the amended, original bill were a bar thereto, if valid.

Sixty-third.—In that the Circuit Court held that the complainants were not entitled to have the will of
1566 1880 applied, as the measure of right between the parties hereto.

Sixty-fourth.—In that said Circuit Court held that the entire estate of Fayerweather, as between the parties hereto, did not pass as in case of intestacy, under the statutes of the State of New York.

Sixty-fifth.—In that said Circuit Court erred in rendering any decree, save a decree overruling and disproving the pleas herein, and awarding to complainants the relief prayed for in the amended, original bill.

WHEREFORE, the said Emma S. Fayerweather and Mary W. *Achter pray that the* said decrees for each, all and every, the errors aforesaid, be as to them, in all things reversed, annulled and held for naught, and that they may be restored to all that they have lost by reason thereof; that the said Circuit Court be directed to restore their said bill; to award a final decree in favor of said complainants upon the merits; and to proceed thereupon according to equity; and to render such decree as said Supreme Court of the United States shall determine to be just,
1567 and in accordance with equity and good conscience.

Dated New York, October 12th, 1903.

ROGER M. SHERMAN,
Solicitor for Emma S. Fayerweather and
Mary W. Achter, Complainants.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOHN B. REYNOLDS, as sole Executor of the Last Will and Codicil of Lucy Fayerweather, deceased, Cross-Complainant,	In Equity. No. 6675.
1569 *against*	
THOMAS G. RITCH and others, Defendants,	

ASSIGNMENTS OF ERROR OF JOHN B. REYNOLDS AS SAID EXECUTOR, CROSS-COMPLAINANT.

And now comes the cross-complainant, John B. Reynolds, as sole executor of the last Will and Codicil of Lucy Fayerweather, deceased, widow of the testator herein, Daniel B. Fayerweather, deceased, and says that, in the proceedings, record and decrees herein, there is manifest error in this, to wit:

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First.—In that the said Circuit Court, in the decrees dismissing the cross-bill filed by this cross-complainant, held and determined that said Circuit Court had no jurisdiction to grant the relief therein prayed, in this, that it held and determined that said Court had no jurisdiction in said cause to entertain the allegations made in the cross-bill, and in the proof in support of each of them, which in substance and to the effect, alleged as follows, namely:

(1.) That the property involved in said suit was claimed by other parties thereto, under and by virtue of a decree of

probate *obtained by* false and *fraudulent* practices upon the parties, and upon the Probate Court.

(2.) That the will of Daniel B. Fayerweather and its codicils, so probated, were not his *last* will and testament, but were null and void.

(3.) That his *last* will and testament was a certain paper, duly executed, published, and declared, upon the second day of October, 1880.

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(4.) That probate thereof had been *prevented by* fraud and contrivance of parties defendant to this suit.

(5.) That all the dealings of said parties-defendant with his estate, and with every part thereof, *were based* upon the probate and the will so probated.

(6.) That all such dealings, and all prior suits and actions in respect thereto, were vitiated, avoided, and null, for *fraud* practised in and about *the procurement of* said probate.

(7.) That the claims of this cross-complainant in this suit, the counter-claims and defenses of the other defendants, in the premises, and the subject-matter of the suit,

were affected by said allegations and said defenses
1572 undermined by, the said genuine last will of October 2nd, 1880, set up by this cross-complainant.

(8.) That full and equitable disposition of the suit, and the rights of the parties, could not be had, but by consideration of the matters and things so alleged by this cross-complainant; by the nullification of the probate decrees so assailed; and by the establishment of the will set up as the true will, by his cross-complaintant, and its enforcement as the basis of the rights of the parties, in respect to the subject-matter of this suit.

Second.—In that said Circuit Court, in its decrees dismissing the cross-bill filed by this cross-complainant herein, held and determined that said Circuit Court had no jurisdiction to grant the relief prayed in said cross-bill, in so far as it charged, in substance, *fraud* and contrivance, in and about *the procurement of* the probate of the will of 1884, and its codicils; and prayed that the defendants should be required to answer such allegations; and either for a decree that, as between the parties, said probate decree was null and void; or that said defend-
1573 ants, or some of them, should be required to go into the Probate Court, or into some Court having jurisdiction, and there consent to the vacating of said fraudulent decree; and to the entry of a decree admitting said real last will of said Fayerweather to probate; and to do in any respect what was equitable in the premises, either in this suit or by its mandate and decree in some other Court or place.

Third.—In that said Circuit Court rendered its decrees, both interlocutory and final, having possession of the cause and jurisdiction of the parties, establishing *an estoppel* against this cross-complainant, available in every other Court, confirming the defendants in their title, possession and control of the estate of said Daniel B.
1574 Fayerweather; nevertheless deciding that it had no jurisdiction to entertain the allegations set up in said cross-bill, and proof thereof, which were adequate to impeach such title, possession and control.

Fourth.—In that said Circuit Court decided that it had no jurisdiction to entertain a cross-bill of complaint in any suit between adversary parties, upon a subject-matter *of general, equitable cognizance*, having the requisite diversity of citizenship, between the complainants and defendants, parties herein, for the due disposition of the equities wherein, it became essential to hold a *probate* decree null and void, between the parties, *for fraud in and*

about its procurement; or wherein it became essential *to establish a will* of realty or of personalty, as the measure or test of right between the parties.

Fifth.—In that said Circuit Court held and decided that cognizance of the establishment of a will, either of realty or personalty, or the application thereof as a measure of right between the parties, in a suit in equity wherein the requisite diversity of citizenship and grounds therefor exist,—does not appertain to said Court.

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Sixth.—In that said Court held and decided that a will of realty or personalty can have no effect in a suit in equity, in said Court, in the State of New York, unless it have been previously established by a decree of a probate court.

Seventh.—In that said Court held and decided that cognizance of a will of realty or personalty, not only *ex-parte* but *inter partes*, is, under no circumstances, within the jurisdiction of said Court, without probate thereof in a State Court of Probate.

Eighth.—In that said Court held and decided that it could not render any relief upon the said cross-bill herein, inasmuch as it could exercise no *probate* jurisdiction.

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Ninth.—In that said Court held and decided that it had no jurisdiction to consider any of the allegations of this cross-complainant, inasmuch as certain relief prayed by him, involved the establishment of a will in lieu of that probated; which said Court held that it had no power ta decree; although the Probate Court, from a defect of power to bring the necessary parties before it, from lapse of time, from being without jurisdiction to exercise equitable powers, or upon any other ground, could

not, or would not, entertain jurisdiction, to deal with the facts by him alleged; and although there were no adequate remedy at law, or in any other court.

Tenth.—In that the said Court held and decided that it had no jurisdiction upon the allegations of this cross-complainant's cross-bill, to decree that this cross-complainant was, under the 1880 will, being the *true* will of said Fayerweather—a beneficiary of a trust in respect of the realty affected; and entitled to have executed a
1577 power of sale by those appointed to take, hold and dispose of the realty, for the uses in said will appointed, and for their benefit; and to require the defendants to do what was useful, convenient or necessary by way of account, conveyance and otherwise, to effectuate such trust.

Eleventh.—In that the said Court decided, and it is decreed that, by the judgments of the Supreme Court of the State of New York, in the suit entitled The Trustees of Amherst College *et al.* against Ritch *et als.* (151 N. Y., 282), as an adjudication of the matters and things in said cross-bill alleged, the State of New York has not deprived said cross-complainant of property *without due pro-*
1578 *cess of law;* and that thereby said cross complainant has not been denied *the equal protection of the law.*

Twelfth.—In that the said Court decided that the said judgments of the Supreme Court of the State of New York, and each of them, were competent evidence herein, against this cross-complainant, of an adjudication of the matters and things in said cross-bill alleged; and in that said Court herein overruled the objection of this cross-complainant to said evidence, that, as such adjudication, said judgments and each of them deprived him of property without due process of law, and denied him the equal protection of the law.

Thirteenth.—In that said Court decided, and it is decreed that the judgment of the Supreme Court of the State of New York in the suit of the Trustees of Amherst College *et al.* against Ritch *et als*, entered December 31st, 1894, *adjudges or concludes* the matters or things in the said cross-bill alleged ; and all, every, or any of them.

Fourteenth.—In that said Court decided, and it is decreed that the judgment of the Supreme Court of the State of New York in the suit of the Trustees of Am-
1579 herst College *et al.* against Ritch *et als.* entered December 30, 1895, *adjudges or concludes* the matters or things in the said cross-bill alleged, and all, every, or any of them.

Fifteenth.—In that said Court decided, and it is decreed; that the judgment of the Supreme Court of the State of New York in the suit of Amherst College *et al.* against Ritch *et als* , entered March 10th, 1897, *adjudges and concludes* the matters or things in the said cross bill alleged ; and all, every, or any of them.

Sixteenth.—In that said Court decided, and it is decreed that the judgment of the Supreme Court of the State of New York, in the suit of the Trustees of Am-
1580 herst College *et al.* against Ritch *et als.*, entered July 6th, 1897, *adjudges or concludes* the matter or things, alleged in the said cross-bill, and all, every, or any of them.

Seventeenth.—In that said Court decided, and it is decreed, that the judgment and order of the Court of Appeals in the suit of the Trustees of Amherst College *et al.* against Ritch *et als.*, entered March 9th, 1897, *adjudges or concludes* the matters or things in said cross-bill alleged ; and all, every, or any of them.

Eighteenth.—In that said Court decided, and it is decreed, that the judgments and order aforesaid *collectively*

adjudge or conclude the matters or things in the said cross-bill alleged; and all, every, or any of them.

Nineteenth.—In that said Court, in the proofs of the defendants Ritch and others (after 6 Q., to the witness Daly) admitted the record on the appeal to the Court of Appeals, in the action of Amherst College against Ritch, upon the offer, and under the objection, following:

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"*Mr. Parsons.*—We next offer in evidence the record on the appeal to the Court of Appeals; and we are willing to stipulate that, so far as the record embraces the record on the appeal to the General Term, only the record of the Court of Appeals should be so used. We ask to have it marked." Which should have been excluded because it was duly objected to on the ground that the Supreme Court, at General Term, under pretense of affirming the judgment of the Court below, made and affirmed a judgment, not within the pleadings in the action, but in conflict therewith; and that the proceedings thereafter were without jurisdiction and void, including the order and judgment of the General Term; and also as incompetent, irrelevant and immaterial and not within the issues.

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Twentieth.—In that said Court, in the proofs of the defendants Ritch and others (after 6 Q to the witness Daly) admitted the order described in the offer, and under the objection, following:

"*Mr. Parsons.*—We offer in evidence an order, made in that action, bearing date March 10, 1897, made by the Special Term of the Supreme Court, ordering that the judgment of the Court of Appeals be made the judgment of the Supreme Court.

Mr. Sherman.—That is objected to for all the reasons last stated, to wit: Objected to on the ground that the Supreme Court, at General Term, under pretence of affirming the judgment of the Court below, made and affirmed a judgment not within the pleadings in the action, but in conflict therewith; and that the proceedings thereafter were without jurisdiction and void, including the order and judgment of the General Term; and also incompetent, irrelevant, and immaterial, and not within the issues."

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Twenty-first.—In that said Court, in the proofs of the defendants Ritch and others (after 6 Q to the witness Daly) admitted the judgment-roll; the judgment entered upon the decision of the General Term; the appeal to the Court of Appeals; the remittitur thereof; the papers upon a motion to amend the remittitur; the order upon that motion; and the final judgment in the action of Amherst College *et al.* against Ritch *et als.*, upon the offer, and against the objection, following:

"*Mr. Parsons.*—The papers that we offer, in addition to those which have been previously offered, are the judgment-roll in the Amherst College suit; including
1584 the judgment entered on the decision of the General Term; the appeal to the Court of Appeals; the remittitur of that Court; and the papers on the motion to amend the remittitur and for a re-argument; the order of the Court of Appeals upon that motion; the order of the Special Term already marked, making the decision of the Court of Appeals the judgment of the Supreme Court; and the final judgment entered in the action."

"*Mr. Sherman.*—Each, every and all of them are objected to, for the reasons last stated in full, to wit: Objected to on the ground that the Supreme Court, at General Term, under pretence of affirming the judgment, of

the Court below, made and affirmed a judgment not within the pleadings in the action, but in conflict therewith; and that the proceedings thereafter were without jurisdiction and void, including the order and judgment of the General Term; and also incompetent, irrelevant and immaterial, and not within the issues."

Twenty-second.—In that said Court, in the proofs of the defendants Ritch and others, question 220 Q., to John B. Reynolds, a witness called by defendants, allowed
1585 the question, referring to letters written to Mrs. Fayerweather by her attorneys, against the objection following:

220 Q. "Have not turned over to whom?

"*Mr. Sherman.*—Counsel for complainants object to this whole line of examination, and to the present question, on the ground that, in order to have the benefit of their pleas, as pleas, these defendants must confine their proceedings thereunder to the issues raised thereby; and that the object of their pleas being, to avoid going into the evidence at large, the defendants, by going into evidence at large, outside the issues raised by their pleas, waive their pleas; and can have no advantage from their pleas, except as answers; and counsel for complainants hereby
1586 gives notice to the defendants that the complainants will, at all times, insist that the defendants have, by that, waived their pleas; and that any further testimony, outside of the issues raised by the pleas, will likewise be insisted upon to have worked the effect above stated."

Twenty-third.—In that said Court, in the proofs of the defendants Ritch and others, question 237 Q. to said witness, referring to Mrs. Fayerweather's papers mentioned in a certain *subpœna duces tecum*, served upon said witness by said defendants, allowed the question, against the objection, following:

237 Q. "What did you produce?"

"*Mr. Sherman.*—Objected to on the ground that the defendants, so far from observing the rule respecting the taking of testimony under a plea, so far from observing the principle that the object of a plea is to prevent the delay and expense of taking testimony at large, are not only taking their testimony at large, but are employing the time of the parties in inquiring into wholly immaterial explanations, or proving obvious, physical facts, occurring under their own observation; and thereby offending every principle which authorizes the introduction of a plea
1587 in an equity suit."

Twenty-fourth.—In that said Court, in the proofs of the defendants Ritch and others, 267 Q. to said witness, allowed the question referring to letters written to Mrs. Fayerweather by her attorneys, against the objection, following:

267 Q. "Have you done what Judge Lacombe said you must do?

"*Mr. Sherman.*—Objected to on the ground that no occasion, opportunity, or request, pursuant to the Judge's order, has been made; that it is not self-operative; but requires some request in order to set it in motion; and, therefore, it is obvious that the witness has not
1588 done what he has not been called upon to do; and I make the same objection that I did before, as to the effect of the course of the defendants, in travelling outside of the issues raised by the pleas, and taking evidence at large in the case; and again notify them that I will insist upon that contention at final hearing, and in all Courts on appeal."

Twenty-fifth.—In that said Court, in the proofs of the defendants Ritch and others, 276 Q. to said witness allowed the question against the objection following 276 Q.:

"Is the course which has been adopted by you under Judge Lacombe's order taken by you under advice of

counsel; have they advised you to do what you have done and to abstain from doing what you have not?"

"*Mr. Sherman.*—Objected to on the ground that these defendants first interposed to the bill of complaint herein, a demurrer; that the demurrer was overruled by Judge Wheeler, after six months' consideration; that these defendants thereupon answered, and subsequently obtained leave from the Court to withdraw their answers, and to file pleas, upon the pretense that the case was barred
1589 by said pleas, setting up only the effect of the alleged adjudication of the matters propounded by the bill, by virtue of the judgment in the so-called Five Colleges' action; that, in obtaining leave to rely upon said pleas these defendants pretended and represented to the Court, that they ought to be allowed so to plead, as a matter of favor, not then being entitled so to do as matter of right; because it would be oppressive, harsh, burdensome and expensive to compel the litigants to go into the evidence at large; and upon that pretence and claim, and upon that alone, they were allowed to file said pleas; that the matters which have been inquired of, by the examination of this witness, have been entirely outside, and unrelated to any question presented by the pleas, as to the existence, or effect, or validity of the adjudication of the Five Colleges' ac-
1590 tion; but have been addressed, so far as they had any legal tendency whatever, to show some estoppel against the widow of Daniel B. Fayerweather; and as against the complainants in the original bill; by virtue of facts alleged or claimed to have been communicated to them through the medium of their own counsel; that the counsel for the defendants have now occupied an hour and a half, in a course of questioning of this witness, oppressive, immaterial, frivolous, and obviously leading nowhere; for the purpose of oppressing the complainants with the worst features of examination into the evidence at large in the cause; contrary to every principle in equity, contrary to the 67th

Rule; and contrary to the limit afforded these defendants, by virtue of their pleas; and thereupon the complainants again repeat their protest, and claim and insist that the pleas are to be taken as answers; and are waived as pleas, and are overruled by the testimony taken under them; and that the matter is at large, without reference to the pleas; and that, therefore, this present question is incompetent, irrelevant and immaterial."

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Twenty-sixth.—In that said Court, in the proofs of the defendants, Ritch and others, 501 R-D-Q., to said witness, allowed the question against the objection following:

"501 R-D-Q. How much did she receive from Mrs. Fayerweather, before she died?

"*Mr. Sherman.*—Objected to, on the ground that this witness was called by the defendants; that the present inquiry does not relate to any matter, touched upon or alluded to, upon the cross-examination; and is, therefore, not re-direct-examination; that, under the pretense of re-direct-examination, under a protest that the cross-examination was irrelevant, the counsel for the defendants are now going into new matter in chief, which is entirely
1592 outside any issue raised by any pleas, and not even competent evidence at large; upon any topic presented by the bill or cross-bill; and counsel for complainants gives the counsel for the defendants notice, that he will at all times and places, insist that, by the inquiry into such topics, under such circumstances, the defendants have waived their pleas; and overruled their pleas and introduced evidence at large in the cause. And I make the further objection, that the only matter which is pertinent here, is what disposition was made of an estate of six millions of dollars, of which Daniel B. Fayerweather was robbed in his lifetime, or at his death; and the property now inquired about, having been conceded to be the property of the persons, whose

disposition or it is now subjected to inquiry, by counsel for the defendants."

Twenty-seventh—In that said Court, in the proofs of the defendants Ritch and others, 56 Q. to Edward M. Grout, a witness called by said defendants, allowed the question against the objection, following :

56 Q. " What would you say, Mr. Grout, as to Mr. Fayerweather being under undue influence at that time ?

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" *Mr. Blaikie.*—Objected to as calling for a conclusion ; and no foundation laid, and incompetent."

Twenty-eighth—In that said Court, in the proofs of the defendants, Ritch and others, 60 Q. to said witness, allowed the question against the objection, following :

60 Q. " In your opinion, was he competent to execute the paper, physically and mentally ?

" *Mr. Blaikie.*—Objected to as incompetent, and immaterial."

Twenty-ninth.—In that said Court, in the proofs of the defendants, Ritch and others, 61 Q to said witness, allowed the question against the objection, following :

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61 Q. " Was he of sound mind and memory ?

" *Mr. Blaikie.*—Objected to as incompetent, and immaterial."

Thirtieth.—In that said Court, in the proofs of the defendants Ritch and others, admitted in evidence the deposition of Hon. Alton B. Parker, at the session of May 15, 1902, against the objection, following :

" *Mr. Blaikie.*—Counsel for complainants, and cross-complainant, objects to the introduction of the testimony

of this witness, Judge Parker; because not given upon legal notice; and not complying with the requirements and rules of practice in this Court, against its introduction at this stage; and also further protest that the examination of this witness, as to his reasons for reaching a conclusion in this case, or as to anything that moved him to testify as he did, is illegal; is contrary to the rules and practice of this Court; is disrespectful to the witness himself; and being evidence at large in the case, it over-
1595 rules the pleas of all defendants. And further, that nothing, drawn out in his testimony, justifies such a course, upon the part of the defendants. He further objects to his testimony as to what transpired at the argument in the State Court, before the General Term in the Five College action, as not the best evidence, and as incompetent; and further objects to what he attempts to testify as to the contents of any brief or briefs, upon the complainants' side, as not the best evidence; and as incompetent."

Thirty-first.—In that said Court, in the cross examination of the complainant Emma S. Fayerweather, allowed the defendants to go into evidence at large in the cause, upon issues not presented by their pleas, as follows:

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587 X-Q. "Miss Fayerweather, I want to give you the opportunity of stating what is your best recollection, upon the subject of how information, about the deed of gift, came to you; whether it came to you while you were in New York; or whether it came to you shortly after your return; and, in the latter case, whether it must not have come to you by letter?"

Which question should have been excluded, because it was duly objected to, on the ground that the witness, not having requested any opportunity, there is no occasion for for the inquiry; and that it has been already fully answered; also on the ground that it is evidence at large

in the cause ; and the legal effect of introducing evidence at large in the cause by these defendants, the complainants will now and at all times insist upon.

Thirty-second.—In that said Court, in the cross examination of the complainants' witness, Elizabeth L. Goodwin, allowed the defendants to go into evidence at large in the cause, upon issues not presented by their pleas, as follows :

1597

232 X-Q. "When did you first see Mr. Reynolds in the household of Mrs. Fayerweather ?

"*Mr. Sherman.*—Objected to as not cross examination, but independent evidence in chief at large in the cause ; and the counsel for complainants contends that, by this course of examination, the defendants overrule their plea ; and raise all the issues which can be raised, under the several bills of complaint."

Thirty third.—In that said Court, in the cross examination of the complainants' witness, Goodwin, allowed the defendants to go into evidnce at large in the cause, upon issues not presented by their pleas, as follows :

1598

236 X-Q. "Was the marriage of Mr. Reynolds to Miss Joyce before, or after the occurrences, to which you have testified upon your examination by counsel for complainants ?"

Which question should have been excluded, because it was duly objected to, as not cross examination ; but as evidence at large in the cause.

Thirty-fourth.—In that said Court, in the cross examination of John E. Parsons, a hostile witness, allowed the defendants to go into evidence at large, in the cause, upon issues not presented by their pleas, as follows :

408 X-Q. "Please to state what was the position taken by Mr. Coudert, representing Mrs. Fayerweather; and Judge Rollins, representing the nieces?"

Which question should have been excluded, because it was duly objected to, on the ground that the position taken by the counsel mentioned will appear in the record; that it already appears that the position they took was taken without full knowledge of the facts, and in ignorance of the facts; and upon being misled by false representations of fact; and the concealment of material facts, repre-
1599 sented to them not to exist; and because the opinion of adverse counsel, as to the contentions made by opposing counsel, is the worst evidence that can be conceived of to establish that proposition.

Thirty-fifth.—In that said Court, in the cross examination of John E. Parsons, a hostile witness, allowed the defendants to go into evidence at large, in the cause, upon issues not presented by their pleas, as follows:

416 X-Q. "By whom was the case of Mrs. Fayerweather's executor and next of kin, presented in the argument at the General Term?"

Which question should have been excluded, because it was duly objected to as being immaterial; and on the further ground that this is not cross examination of
1600 any matter inquired of in chief, either *de bene esse*, or any other kind of cross examination; and as new matter; whereupon the complainants insist that the defendants, by giving evidence at large in the cause in this matter, have overruled their pleas.

Thirty-sixth.—In that said Court, in the cross examination of John E. Parsons, a hostile witness, allowed the defendants to go into evidence at large, in the cause, upon issues not presented by their pleas, as follows:

420 X-Q. "What was the position taken by the gentleman, purporting to represent the widow's executor and next-of-kin, upon the trial of that case?"

Which question should have been excluded, because it was duly objected to as being incompetent, irrelevant, immaterial; not cross examination as to any matter inquired of in chief; because the record is the best evidence; and because this is evidence at large in the cause, and hence overrules the pleas.

Thirty-seventh.—In that the Court allowed the question, upon cross examination of John E. Parsons a hostile witness, following:

1601

421 X-Q. "Mr. Parsons, in answer to question 17, you gave this testimony: 'The persons referred to were represented by most competent counsel, Judge Rollins and Mr. Coudert. Those gentlemen were, as I assumed, as I believed, fully possessed of all information bearing upon the subject; and I have every reason to suppose that in the discharge or their duty they communicated to their clients such information as they had, upon which subject I know nothing.'"

There was a motion made after that answer to strike out, as not responsive. "I wish you would state whether or not Messrs. Coudert or Rollins, so far as you know, were possessed of all information bearing upon the subject"?

1602

Which question should have been excluded, because it was duly objected to, on the ground that the question involves the opinion of the witness, or the conclusion of the witness, of what the subject was; of what evidence bore upon it; and as to what Messrs. Coudert and Rollins had, or had not, in their possession, or knowledge; as incompetent; as evidence at large in the cause: and on the ground that the question should have a tendency to elicit the facts from which the Court can draw the inference, embodied in the question.

Thirty-eighth.—In that the Court allowed the question upon cross-examination of John E. Parsons, a hostile witness, following:

429 X-Q. "Mr. Parsons, this examination is with reference to matters to which you have testified, which the counsel for the complainants moved to strike out, brought out by the direct examination. In answer to question 194, you stated, after referring to the deed of gift and the beneficiaries named therein, 'I have always un-
1603 derstood that it met with the approval of Mrs. Fayerweather; at all events, I never heard anything to the contrary'. What understanding did you have, up to that time, with reference to the instrument being approved by Mrs. Fayerweather?"

Which question should have been excluded, because it was duly objected to, as calling for conclusions of witness; and not for any fact which can be relevant or competent here; as evidence at large in the cause; and not cross-examination; that the basis for the alleged cross-examination consists of answers, forced upon the complainants, not responsive to their questions; at which they protested at the time; and moved to strike out.

1604

Thirty-ninth.—In that the Court allowed the question, upon cross-examination of John E. Parsons, a hostile witness, following:

431 X-Q. "At the time that you had those conversations, did Mr. Coudert know of the conversations between Mr. Vaughan and Mr. Fayerweather, of which Exhibit 0a was a memorandum"?

Which question should have been excluded, because it was duly objected to, as involving the conclusion of the witness; as not the proper mode of proof of what Mr. Coudert does, or does not, know; because, it appears

from the testimony of the witness, that Mr. Coudert knew nothing about Exhibit Oa, until it was produced in the Five College trial; and as incompetent, irrelevant and immaterial; and as evidence at large in the cause.

Said question was then answered thus:

"A. My recollection is that the pencil-memorandum on the envelope, which subsequently, upon the Truax trial, became marked Exhibit Oa, related to what passed between Mr. Fayerweather and Mr. Vaughan on
1605 November 15th, 1890. Mr. Vaughan testified that, in that conversation—testified upon the probate-contest, that in that conversation there did occur what the memorandum indicated. The memorandum of itself showed nothing, other than a statement of subjects. Mr. Vaughan testified to the conversation itself. I wish to say of recollection, as well as part of the record of the contest-trial, that what then occurred, informed Mr. Coudert fully of that conversation, so far as I had any knowledge or information about it then; or have ever had such knowledge or information since; and the suggestion, or any suggestion, by anybody that Mr. Coudert made the settlement, in ignorance upon that subject, is absolutely untrue, and has no shadow of foundation."

1606

Which answer should have been stricken out, because a motion therefor was duly made thus:

"*Mr. Sherman.*—I move to strike the answer out as not responsive; as involving the conclusions and opinions of the witness; as a contradiction of the record in the Five College action; and as a contradiction of the record in the Surrogate's contest."

Fortieth.—In that the Court allowed the answer to stand upon cross-examination of John E. Parsons, an adverse witness, following:

432 X-Q. "What, if anything, did you have to do with fixing the fees of Coudert and Rollins in that contest? A. Absolutely nothing. I learned at the time, and I think from Mr. Coudert, what was his charge and what was the charge of Judge Rollins. My impression would be, and I think I recall, the way in which it came about was in the wish to have checks arranged. I think that Mr. Coudert said that it was the wish of his clients that there should be separate checks. Whether there were separate checks in the end, or not, I do not recall."

1607

Which answer should have been stricken out, because motion was duly made thus: I move to strike out the answer after the first sentence as not responsive and as incompetent.

Forty-first.—In that the Court overruled the objection and denied the contention made by counsel for complainants, upon the question addressed to the complainant, Emma S. Fayerweather, under cross-examination, following:

382 X-Q. (Handing paper). "Look at the paper which I now show you and tell me if you recognize that as the complaint in that action?"

1608

Which question should have been excluded because it was duly objected to as follows:

"*Mr. Sherman.*—Counsel for the complainants objects to the protracted examination which has occurred at the instance of counsel for the defendants, of matters having no relevancy whatever to the special plea, and which, if they have any legal tendency, relate to matters at large in the case; and which have no possible excuse or pretext in a *de bene esse* or provisional cross-examination, inasmuch as those matters have not been inquired of in chief;

and insists that the defendants, having availed themselves of this opportunity to exploit the case of the complainants at large, shall hereafter be held to the strict rule in regard to the proof at large in the cause, after having filed a plea: and shall not be permitted after exploiting the complainants' case to strike out the evidence upon the pretext that it was provisional cross-examination; but insists that hereafter and that at all times and places the defendants shall be held to the legal rule, that they have overruled their plea by going into evidence at large with full notice;
1609 and that they are entitled to no benefit from the proof at large, inasmuch as it is not responsive to any pleading filed by them."

Forty-second.—In that the Court overruled the objection to the question asked by the defendants of the complainant, Emma S. Fayerweather, upon her cross-examination, following:

"575 X-Q. Did such a letter, so far as you know or were informed, come to Mrs. Achter?"

Which question should have been excluded because it was duly objected to as being immaterial, on the ground that the writing of any such letter, if any such were written, is a crime; that it is in violation of the Penal Code, and of the Statutes of the United States, in-
1610 asmuch as the attempt to intimidate or influence the parties to a pending action by threats is a crime; on the ground that it is evidence at large in this case; that it has no relation to any of the issues in this case; and that it is obviously brought to the attention of the witness at this time for the purpose of, and in pursuance of a clear plan, observable throughout the course taken by the defendants herein, to intimidate and bully and annoy the complainants.

Forty-third.—In that said Circuit Court did not, upon final hearing, treat the cause as one upon said cross-bill, *pleas which stood for answer*, replication thereto, and proofs but treated the cause as presented upon cross-bill, *pleas*,

proofs ; replication and proof: and thereupon sustained the pleas, and decided that they were a bar to all the matters in said cross-bill alleged, set up and propounded; and rendered a decree thereupon, dismissing said cross-bill upon its merits ; whereas said Court should have decided that said pleas were disproved ; and should have awarded to this cross-complainant a decree upon cross-bill, *answer*, and replication upon the merits, sustaining the allegations and prayers of his said cross-bill, with suitable provisions to effectuate the same.

1611

Forty-fourth.—In that the Circuit Court should have decided that the defendants, and each of them, had, by the form of their pleas, and the introduction of evidence, at large, outside the issues presented thereby, overruled their pleas ; so that the cause was properly before the Court for final hearing upon the merits.

Forty-fifth.—In that the decrees should have been in favor of this cross-complainant, and against the defendants *interposing pleas*, and each of them upon the *truth* of *their* pleas.

1612

Forty-sixth.—In that the decrees should have been in favor of the cross-complainant, and against the other defendants, and each of them, interposing pleas upon the *sufficiency* of their pleas to bar the matters alleged in said cross-bill herein, or any of them.

Forty-seventh.—In that the Circuit Court held the proceedings, upon the appeal of the witness, Prescott Hall Butler, whereby the decision of the Circuit Court, requiring said witness to answer concerning the contents of the codicil drawn by him, was reversed by the Circuit Court of Appeals, to be valid and binding upon said Cir-

cuit Court; whereas said proceedings were unauthorized by law; and without jurisdiction.

Forty-eighth.—In that said Circuit Court held that its decision and orderd etermining that the witness, Prescott Hall Butler, was in contempt for his refusal to answer the questions propounded to him respecting the contents of a certain codicil to the will of Daniel B. Fayerweather, drawn by said Butler and unlawfully destroyed,
1613 by the defendant, Vaughan, was lawfully or effectively reversed by the mandate of the Circuit Court of Appeals, made upon a writ of error sued out by said Butler; inasmuch as said writ of error was null, void and of no force or effect; and the said mandate was not issued in pursuance of any jurisdiction, power or authority.

Forty-ninth.—In that the said Circuit Court overruled the objections made by this cross-complainant to the introduction under the pleas of the Trustees of Hamilton College, and those defendants in like case with them, *of the record* in the suit of the Trustees of Amherst College *et al.* against Ritch *et als.*—so far as it contained proofs or evidence of matters *outside of* the judgment roll.

1614

Fiftieth.—In that the said Circuit Court overruled the contention made by said cross-complainant that the introduction under the plea of the Trustees of Hamilton College and those defendants in like case with them, by said defendants, of the proofs and evidence, and of matters *outside of* the judgment roll, in the suit of the Trustees of Amherst College *et al.* against Ritch *et als.*—including *the briefs* presented to the State Court by the attorneys and counsel for this cross-complainant, in that action, was evidence *at large* in this cause; *not* responsive to the issues, presented by the pleas; tending to support a defense *not* pleaded; and in not thereupon overruling said pleas, de-

priving said defendants of the advantage of the plea; and in not holding that the record presented a case upon cross-bill, *answers*, and replication; and *therefore* requiring a final decree upon the merits.

Fifty-first.—In that said Circuit Court held that *it was constrained to* its said decrees against its own judgment, by operation of certain decisions or opinions given in the Circuit Court of Appeals, upon appeal herein from an order reversing its order of injunction herein,
1615 which said decision was rendered upon an interlocutory appeal upon a record made up of affidavits, wherein this appellant had no opportunity of cross-examination of witnesses; and which decision further assumed to overrule the solemnly declared law of the case in favor of this cross-complainant, and its interlocutory decree thereon overruling demurrers to the bill; which said decree was not before the Circuit Court of Appeals for review; whereby that Court assumed beyond its powers and established practice, indirectly to reverse a solemn decision in favor of this cross-complainant upon the equity of the bill; which that Court had no jurisdiction to do by a direct appeal; wherein the Circuit Court of Appeals ignored and disregarded its obligations, as well as the obligation of the Circuit Court, to
1616 treat the solemn judgment upon demurrer to the bill as the law of the case, until it should be directly reversed upon appeal from a final decree; and to confirm all incidental features of the case, and particularly an injunction *pendente lite*, thereto.

So that this cross-complainant was subjected to the imposition of costs, by an assumption of power by the said Circuit Court of Appeals upon the reversal of said injunction order; and the decision so made was no restraint upon the power, or bar to the propriety, of the decision by the Circuit Court, and an award of a final decree in favor of this cross-complainant in conformity with the expressed

opinion of the said Circuit Court and of two of its Judges, that this cross-complainant was entitled to a decree in his favor.

Fifty-second.—In that said Circuit Court held that the matters adjudged by the State Court, or any of them, in the case of the Trustees of Amherst College *et al. v.* Ritch *et als.* (151 N. Y., 282), were *the same* matters presented by this cross-bill.

1617

Fifty-third.—In that said Circuit Court held that the release alleged in the pleas was available *as a bar* to the prayer of said cross-complainant, upon allegations impeaching the capacity of the person to whom said release ran.

Fifty-fourth.—In that said Circuit Court held that the *releases* pleaded by the defendants *were* a *bar*, as to matters, which impugned their fairness and good faith, arising, and disclosed and known to this cross-complainant after the execution and delivery of said releases, and theretofore by the fraud and contrivance of the defendants, concealed from the widow of said Daniel
1618 B. Fayerweather, so that said releases were construed to apply to bar the right of cross-complainant to assert said widow's statutory interest, against the secret trust affecting the residuary estate, notwithstanding that the existence of that trust was concealed from her, and fraudulently denied by the defendants, before and in the very act of procuring said releases.

Fifty-fifth.—In that said Circuit Court held that the said release released the defendants from compliance with the undertakings which were stipulated by them, or some of them, to be done, given and carried out, as a consideration for said release, in this, to wit: the said releases

promised and agreed as a consideration to said Lucy Fayerweather, that they would convey, transfer and release to her, and her heirs and assigns, *the burial lot* wherein the remains of Daniel B. Fayerweather were to be interred, so that her right to burial therein should be inalienably secured; but the said defendants, or some of them, in disregard and violation of the said promise, wholly omitted and *refused so to do;* and disqualified themselves from so doing, *and permitted the tomb to fall into decay, dilapidation and neglect;* all of which the said Court
1619 holds not to be any breach of the consideration of said release, or said violation in any wise to impair the benefits accruing to said defendants from said release.

Fifty-sixth.—In that said Circuit Court held that the allegations of said cross-bill, and the proof in support thereof, impeaching the probate of the will under which the defendants herein, other than this cross-complainant, do not amount to, and were not based upon a *new title or newly-discovered evidence*, available in this cause; notwithstanding any adjudication, either by the decree of probate, or the judgment in the case of the Trustees of Amherst College *et al.* against Ritch *et als.*

1620

Fifty-seventh.—In that said Circuit Court held that the allegations of this cross-bill, and of said amended bill, impeaching the release set up by the defendants, and the proofs in support thereof, do not amount to and were not based upon a new title, or newly-discovered evidence available in this cause, notwithstanding any adjudication, either by the decree of probate or the judgments in the case of the Trustees of Amherst College *et al.* against Ritch *et als.*

ASSIGNMENTS OF ERROR OF JOHN B. REYNOLDS.

Fifty-eighth.—In that said Circuit Court held that by the judgment in the case of the Trustees of Amherst College *et al.* against Ritch *et als.* or some of them, *the validity of the releases*, attacked and asserted by the pleas, as against the allegations of said cross-bill, had been adjudicated, sustained, *passed upon, or considered by*, said State Court.

Fifty-ninth.—In that said Circuit Court held that said releases, attacked by said cross-bill, *were valid*.

1621

Sixtieth.—In that said Circuit Court held that said release attacked by the cross-bill was a bar thereto, *if* valid.

Sixty-first.—In that said Circuit Court held that said cross-complainant was not entitled to have *the will of 1880*, of said testator, applied as the measure of right between the parties hereto.

Sixty-second.—In that said Circuit Court held that the entire estate of Fayerweather, as between the parties hereto, did not pass, as in case of intestacy, under the Statutes of the State of New York.

1622

Sixty-third.—In that said Circuit Court erred in rendering any decree, save a decree overruling and disproving the pleas herein, and awarding to said cross-complainant the relief prayed for in said cross-bill.

Sixty-fourth.—In that said Circuit Court erred in rendering any decree, save a decree overruling and disposing of the pleas herein, and awarding to said cross-complainant, the relief prayed for in his said cross-bill.

WHEREFORE, the said John B. Reynolds, as Sole Executor of the last will and codicil of Lucy Fayerweather, deceased, prays that the said decree, for each, all and every the errors aforesaid, be, as to him, in all things reversed, annulled, and held for naught; and that, as said cross-complainant, he may be restored to all that said Lucy Fayerweather and those entitled to her estate, have lost by reason thereof; that the said Circuit Court be directed to restore his said cross-bill; to award a final decree in favor of this cross-complainant, upon the merits;
1623 to proceed thereupon according to equity; and to render such decree as said Supreme Court of the United States shall determine to be just, and in accordance with equity and good conscience.

WILLIAM BLAIKIE,
Solicitor for John B. Reynolds, as Sole Executor of the Last Will and Codicil of Lucy Fayerweather, Deceased,
Cross-Complainant.

Dated New York, October 15th, 1903.

1624

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Complainants-Appellants,

1625 *against*

THOMAS G. RITCH. JUSTUS L. BULKLEY and HENRY B. VAUGHAN, individually, and as Trustees and Executors of the Last Will and Testament of Daniel B. Fayerweather, deceased, and of the codicils thereto, The Trustees of Amherst College, The Trustees of Dartmouth College, The Trustees of Hamilton College, The University of Rochester, The President and Trustees of Williams College, The President
1626 and Trustees of Bowdoin College, The Union Theological Seminary in the City of New York, Cornell University, The Adelbert College of the Western Reserve University, The Northwestern University, The Woman's Hospital in the State of New York, The Mount Sinai Hospital, The Presbyterian Hospital in the City of New York, The Manhattan Eye and Ear Hospital, St. Luke's Hospital in

Appeal and Allowance.

Equity.

No. 6675.

the City of New York, Wesleyan University at Middletown, Conn., Lafayette College at Easton, Pa., Marietta College, The President and Fellows of Yale College in New Haven, Conn.; The Trustees of Columbia College in the City of New York, and John B. Reynolds, as Sole Executor of the Last Will, and of the Codi-
1627 cil thereto, of Lucy Fayerweather,
Defendants-Appellees.

The above-named Emma S. Fayerweather and Mary W. Achter, conceiving themselves aggrieved by the decree entered herein on January 14th, 1901, and by the final decree entered on October 10th, 1902, herein, do hereby appeal from said decrees to the Supreme Court of the United States, and pray that this their appeal may be allowed; and that a transcript of the record and proceedings upon which said decrees were made, duly authenticated, may be sent to the said Supreme Court at the City of Washington, in the District of Columbia.

1628

Dated New York, October 15th, 1903.

ROGER M. SHERMAN,
Solicitor for said Appellants,
206 Broadway,
New York.

The foregoing appeal is hereby allowed October 15, 1903, for the review of the questions set forth in the Assignments of Error filed herewith, as well of jurisdiction as otherwise.

E. HENRY LACOMBE,
U. S. Circuit Judge.

PROOF OF SERVICE.

Service of a copy of the Annexed Appeal and its Allowance is hereby admitted this 16th day of October, 1903.

Solicitors for the Defendants,
BULKLEY & VAUGHAN.

Copy received Oct. 17th, 1903,
ROOT, HOWARD WINTHROP & STIMSON,
Solicitors for the Defendant the Trustees of Hamilton College.

1629

SWAYNE & SWAYNE,
Solicitors for the Defendant Lafayette College.

Oct. 17.

Solicitor for the Defendant University of Rochester.

SCOTT & UPSON,
Solicitors for Defendant Adelbert College of the Western Reserve University.

BUTLER NOTMAN, JOLINE & MYNDERSE,
Solicitors for the Defendant the President and Trustees of Bowdoin College.

1630

Solicitors for Defendant Wesleyan University at Middletown, Conn.

Solicitors for the Defendant The Woman's Hospital of the State of New York.

DE FOREST BROTHERS,
Solicitors for the Defendant The Presbyterian Hospital in the City of New York.

Solicitor for the Manhattan Eye & Ear Hospital.

Solicitors for Defendants Ritch, Cornell University & Marietta College.

Received on the 17th October.

JAMES L. BISHOP,

1631 Solicitor for the Defendant the Trustees of Amherst College.

PUTNEY, TWOMBLEY & PUTNEY,

Solicitors for the Defendants President & Trustees of Williams College and the Union Theolological Seminary.

Solicitors for the Defendant the Northwestern University.

RUSSELL & HOLMES,

Solicitors for the Defendant the Trustees of Dartmouth College.

1632 Solicitors for the Defendant the President and Trustees of Yale College in New Haven, Conn.

Solicitors for the Trustees of Columbia College in the City of New York.

HOADLY, LAUTERBACH & JOHNSON,

Solicitors for the Mt. Sinai Hospital.

Solicitors for St. Luke's Hospital in the City of New York.

AFFIDAVIT OF SERVICE.

U. S. CIRCUIT COURT,

FOR THE SOUTHERN DISTRICT OF N. Y.

EMMA S. FAYERWEATHER and another,
Complainants,
1633 *against*
THOMAS G. RITCH, &c., and others,
Defendants.

In Equity, No. 6675.

BOROUGH OF MANHATTAN,
City, County and State of New York,, } ss:

FRANK E. SMITH, being duly sworn, says:

I am over twenty-one years, and an attorney-at-law. October 17th, 1903, in said Borough of Manhattan, I served the annexed appeal and its allowance upon the defendants Bulkley & Vaughan, herein, at the office of their attorneys herein, Messrs. Parsons, Shepard & Ogden, at 52 William street in said Borough, by showing to Al-
1634 bert F. Wright Judge Lacombe's signature to said original appeal and allowance, and delivering to said Wright personally a copy of said appeal and allowance and leaving it with him. He then and there told me, and I believe, that said firm were at that time absent from said office, and that he, said Wright, was in charge of it.

October 17th, 1903, at about 10 A. M. in said Borough of Manhattan I served the annexed appeal and its allowance upon the Woman's Hospital, in the State of New York, at the law office of its solicitor herein, William W. Hoppin, Esq., at 52 William street, in said Borough of Manhattan, by showing the signature of Judge Lacombe to the original of said appeal and allowance to E. Eliscu,

Esq., and by delivering to him personally a copy of said appeal and allowance and leaving it with him. He then and there informed me, and I believe, that said Hoppin was then absent from said office, and that he, said Eliscu, was in charge of it.

October 17th, 1903, I served said appeal and its allowance upon the defendants Ritch, Cornell University and Marietta College herein, by showing said original ap-
1635 peal and allowance and Judge Lacombe's signature thereto, to C. N. Bovee, Jr., of the firm of Ritch, Woodford, Bovee & Butcher, solicitors for said defendants herein, personally, and by delivering a copy of said appeal and allowance to said Bovee personally, and leaving it with him.

October 16th, 1903, I served the annexed appeal and its allowance upon the defendants The Northwestern University herein, by showing said original appeal and allowance and Judge Lacombe's signature thereto. to W. B. Greeley, of the law firm of Redding, Kiddle & Greeley, solicitors for said Northwestern University herein, by delivering a copy of said appeal and its allowance to said Greeley personally, and leaving it with him.

1636

October 16th, 1903. I served the annexed Appeal and its Allowance upon the defendant, St. Luke's Hospital in the City of New York, herein by showing said original Appeal and Allowance and Judge Lacombe's signature thereto to Mr. Marshall, of the law firm of Marshall, Moran & Williams, solicitors for the defendant herein, at their office at 30 Broad Street, in said Borough of Manhattan, and by delivering a copy of said Appeal and its Allowance to said Marshall personally, and leaving it with him at said office.

October 16th, 1903. I served the annexed Appeal and its Allowance upon the defendant, The Manhattan Eye &

Ear Hospital, herein, by showing the said original Appeal and Allowance, and Judge Lacombe's signature thereto, to W. V. Volkel, at the law office of Robt. J. Hare Powel, Esq., the solicitor for said defendant herein, and delivering to said Volkel personally, a copy of said Appeal and Allowance, and leaving it with him at the said office. He then and there told me, and I believe it, that said Powel was at that time absent from, and that he said Volkel was then in charge of, said office.

FRANK E. SMITH.

1637

Sworn to before me this 19th day of October, 1903.

L. V. BROOME,
NOTARY'S SEAL.
Notary Public,
New York County,
No. 155.

BOROUGH OF MANHATTAN, *City, County and State of New York,* } ss.:

FRANK E. SMITH, being further sworn, says: October 16th, 1903, I served the annexed Appeal and Allowance upon the defendants the Trustees of Columbia College in the City of New York, by showing said original Ap-
1638 peal and Allowance, and Judge Lacombe's signature thereto, to N. M. Burrell, at the office of John McLean Nash, Esq., the solicitor for said defendant, at 63 Wall St., New York, and by delivering to said Burrell personally a copy of said Appeal and Allowance, and leaving it with him. He then and there told me, and I believe it that said Mr. Nash was then absent from said office, and that he, said Burrell, was in charge for Mr. Nash during his absence.

FRANK E. SMITH.

Sworn to before me October 19th, 1903.

L. V. BROOME,
NOTARY'S SEAL.
Notary Public,
New York County,
No. 155.

AFFIDAVIT OF SERVICE.

U. S. CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER, and another,
Complainants,

1639 *against*

THOMAS G. RITCH, &c., and others,
Defendants.

In Equity No. 6675.

BOROUGH OF MANHATTAN,
City, County and State of New York, } ss.:

WILLIAM BLAIKIE, being duly sworn, says: I am over twenty-one years old.

October 17th, 1903, I served the annexed appeal and its Allowance upon the defendant, the President and Trustees of Yale College in New Haven, Conn.,
1640 herein by showing the signature of Judge Lacombe to said Appeal and Allowance to Mr. Dohrman, at the office of Haley Fiske, Esq., the solicitor for said defendant herein, at No. 1 Madison Ave. in the Borough of Manhattan aforesaid, and delivering to said Dohrman personally, and leaving with him a copy of said Appeal and Allowance herein.

Said Dohrman then and there told me, and I believe him, that at that time, said Fiske was in Europe. This was at about twelve noon.

October 17th, 1903, at about 12:45 P. M. I served said Appeal and its Allowance upon the defendant the, Wes-

leyan University at Middletown, Conn., by depositing a copy thereof, enclosed in a sealed wrapper, directed to Messrs. G. G. & F. Reynolds, Solicitors for said defendant herein, in their office letter box, at the outer door of their office at No. 16 Court St., Brooklyn, N. Y., and leaving it there, there being no person in charge of said office at that time. The office—it being Saturday—was closed.

1641

October 17, 1903, at about 2:25 P. M., I served said Appeal and its Allowance upon the defendant, the University of Rochester herein, by showing the original Appeal and Allowance and Judge Lacombe's signature thereto, to Seth S. Terry, Esq., Solicitor for said defendant herein personally, by delivering a copy thereof to said Terry personally, and leaving it with him, at or near No. 80 Broadway, New York.

WILLIAM BLAIKIE.

Sworn to before me this 19th day of October, 1903.

L. V. BROOME,
Notary Public,
New York County No. 155.

1642 NOTARY'S SEAL.

UNITED STATES OF AMERICA, SS.

The President of the United States to Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, individually and as Trustees and Executors of the the Last Will and Testament of Daniel B. Fayerweather, deceased, and of the codicils thereto, The Trustees of Amherst College, The Trustees of Dartmouth College, The Trustees of Hamilton College, The University of Rochester, The

President and Trustees of Williams College, The President and Trustees of Bowdoin College, the Union Theological Seminary in the City of New York, Cornell University, The Adelbert College of the Western Reserve University, The North Western University, The Woman's Hospital in the State of New York, The Mount Sinai Hospital, The Presbyterian Hospital in the City of New York, The Manhattan Eye and Ear Hospital, St Luke's Hospital in the City of New York,
Wesleyan University at Middleton, Conn., Lafay-
1643 ette College at Easton, Pa., Marietta College, The President and Fellows of Yale College in New Haven, Conn., The Trustees of Columbia College in the City of New York, and John B. Reynolds, as Sole Executor of the Last Will and Testament, and of the Codicil thereto, of Lucy Fayerweather, deceased:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the City of Washington, in the District of Columbia, on the 12th day of November, 1903, pursuant to an appeal allowed and filed in the office of the Clerk of the Circuit Court of the United States for the Southern District of New York, wherein Emma S. Fayer-
weather and Mary W. Achter, are appellants, and
1644 you and each of you are appellees, to show cause, if any there be, why the decrees in said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Melville W. Fuller, Chief Justice of the United States this 15th day of October, 1903.

E. HENRY LACOMBE,
U. S. Circuit Judge.

PROOF OF SERVICE.

Service of a copy of the annexed Citation is hereby admitted, this 15th day of October, 1903.

Solicitors for the Defendants Bulkley & Vaughan.

Copy received Oct. 17th, 1903.

ROOT, HOWARD WINTHROP & STIMSON,
Solicitors for Defendant, the Trustees of Hamilton College.

1645

SWAYNE & SWAYNE,
Solicitors for the Defendant Lafayette College. Oct. 17.

Solicitor for the Defendant University of Rochester.

SCOTT & UPSON,
Solicitors for the Defendant Adelbert College of the Western Reserve University,

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Solicitors for the Defendants, the President and Trustees of Bowdoin College.

1646

Solicitors for Defendant, Wesleyan University at Middletown, Conn.

Solicitors for the Defendant The Woman's Hospital of the State of New York.

DEFOREST BROTHERS,
Solicitors for the Defendant Presbyterian Hospital in the City of New York.

Solicitor for the Manhattan Eye & Ear Hospital.

Solicitors for Defendants Ritch, Cornell University and Marietta College.

JAMES L. BISHOP,
Solicitor for the Defendant, the Trustees of Amherst College.

1647

PUTNEY, TWOMBLEY & PUTNEY,
Solicitors for the Defendants, President and Trustees of Williams College and the Union Theological Seminary.

Solicitors for the Defendant Northwestern University.

RUSSELL & HOLMES,
Solicitors for the Defendant the Trustees of Dartmouth College.

Solicitors for the Defendant the President and
1648 Trustees of Yale College in New Haven, Conn.

Solicitors for the Trustees of Columbia College in the City of New York.

HOADLY, LAUTERBACH & JOHNSON,
Solicitors for the Mt. Sinai Hospital.

Solicitors for St. Luke's Hospital in the City of New York.

AFFIDAVIT OF SERVICE.

U. S. CIRCUIT COURT.

FOR THE SOUTHERN DISTRICT OF N. Y.

EMMA S. FAYERWEATHER and another, Complainants, *against* THOMAS G. RITCH, &c., and others, Defendants.	In Equity, No. 6675.

BOROUGH OF MANHATTAN, *City, County and State of New York*, } ss.:

FRANK E. SMITH, being duly sworn says: I am over twenty-one years old, and am an attorney at law.

October 17th, 1903, in said Borough of Manhattan, I served the annexed citation upon Messrs. Parsons, Shepard & Ogden, Solicitors for the defendants Bulkley & Vaughan, herein, by showing to Albert F. Wright, Judge Lacombe's signature to said original citation, and delivering to said Wright personally, a copy of said citation, at the law office of said firm of Messrs. Parsons, Shepard & Ogden, at 52 William street, New York, and leaving it with said Wright. He then and there informed me, and I believe that said firm were at that time absent from said office, and that he was in charge of it.

1649

1650

October 17th, 1903, at about 10 A. M., in said Borough of Manhattan, I served the annexed citation upon Wm. W. Hoppin, Esq., solicitor of the defendant, the Woman's Hospital in the State of New York, herein, by showing to

E. Eliscu, Judge Lacombe's signature to said original citation, by delivering a copy of said citation to him personally, and leaving it with him at the office of said Hoppin, at 52 William street, in the said Borough of Manhattan. Said Eliscu then and there informed me, and I believe that said Hoppin was then absent from said office, and that said Eliscu was in charge of it.

At their office, at 18 Wall street, New York, October 17th, 1903, at about 10 A. M. I served the annexed
1651 citation upon Messrs. Ritch, Woodford, Bovee & Butcher, solicitors for the defendants Ritch, Cornell University and Marietta College herein, by delivering a copy of said citation to C. N. Bovee, Jr., a member of said firm, personally, and leaving it with him. And by showing to him at the same time Judge Lacombe's signature of said original citation.

October 17th, 1903, at their office at 38 Park Row, in said Borough of Manhattan, I served the annexed citation upon the defendants, the Northwestern University herein, by showing to W. B. Greeley, of the firm of Redding, Kiddle & Greeley, solicitors for said defendant herein, said original citation, and the signature of Judge Lacombe thereto, and delivering to said Greeley a copy thereof, and leaving it with him.

1652

October 16th, 1903, at their office, at 30 Broad street, in said Borough of Manhattan, I served the annexed citation upon Messrs. Marshall, Moran & Williams, as solicitors for the defendant St. Luke's Hospital, in the City of New York herein, by showing to Mr. Marshall of said firm, the signature of Judge Lacombe to said original citation, and by delivering to said Marshall personally and leaving with him a copy of said citation.

October 16th, 1903, at his office, at 120 Broadway, in said Borough of Manhattan, I served the annexed Citation upon the defendant The Manhattan Eye and Ear Hospital,

by showing to W. V. Volkel, at the office of R. J. H. Powel aforesaid, said Powel being the attorney for said defendant herein, Judge Lacombe's signature to said original Citation, and by delivering a copy of said Citation to said Volkel personally, and leaving it with him.

He then and there informed me, and I believe that said Powel was then absent from said office, and that he, said Volkel, was in charge of it.

FRANK E. SMITH.

1653

Sworn to before me this 19th day of October, 1903,

{ NOTARY'S SEAL. }

L. V. BROOME,
Notary Public (No. 155),
New York County.

BOROUGH OF MANHATTAN,
City, County and State of New York, } ss.:

FRANK E. SMITH, being further sworn, says: October 16th, 1903, I served the annexed Citation upon the defendant The Trustees of Columbia College in the City of New York, by showing said original Citation and Judge Lacombe's signature thereto to N. M. Burrell, at the office of John McLean Nash, the solicitor for said de-
1654 fendant herein, at 63 Wall Street, New York, by delivering to said Burrell personally a copy of said Citation and leaving it with him. He then and there told me, and I believe it, that said Mr. Nash was then absent from said office, and that he, said Burrell, was in charge for Mr. Nash during his absence.

FRANK E. SMITH.

Sworn to before me October 19th, 1903,

{ NOTARY'S SEAL. }

L. V. BROOME,
Notary Public (No. 155),
New York County.

AFFIDAVIT OF SERVICE.

U. S. CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF N. Y.

EMMA S. FAYERWEATHER and another,
Complainants,

1655 *against*

THOMAS G. RITCH, &c., and others,
Defendants.

In Equity—No. 6675.

BOROUGH OF MANHATTAN,
City, County and State of New York, } ss.:

WILLIAM BLAIKIE, being duly sworn, says: I am over twenty-one years old. October 17th, 1903, I served the annexed CITATION upon the defendant, the President and Fellows of Yale College in New Haven, Conn., by showing the signature of Judge Lacombe to said Citation to Mr. Dohrman, at the office of Haley Fiske, Esq., the solicitor for said defendant herein, at No. 1 Madison avenue,
1656 in the Borough of Manhattan aforesaid, delivering to said Dohrman personally, and leaving with him a copy of said Citation herein. Said Dohrman then and there told me, and I believe him, that at that time said Fiske was in Europe. This was at about 12 noon.

October 17, 1903, at about 12:45 P. M., I served said Citation upon the defendant, the Wesleyan University at Middletown, Conn., by depositing a copy thereof, enclosed in a sealed wrapper, directed to Messrs. G. G. & F. Reynolds, solicitors for said defendant herein, in their office letter-box, at the outer door of their office at No. 16 Court street, Brooklyn, N. Y., and leaving it there, there being no person in charge of said office at that time, the office—it being Saturday—being closed.

AFFIDAVIT OF SERVICE.

October 17, 1903, at about 2:25 P. M., I served said Citation upon the defendant, The University of Rochester, herein, by showing the original Citation and Judge Lacombe's signature thereto, to Seth S. Terry, Esq., solicitor for said defendant herein, personally, by delivering a copy thereof to said Terry personally and leaving it with him at about No. 80 Broadway, New York.

WM. BLAIKIE.

Sworn to before me this 19th day of October, 1903.

1657 L. V. BROOME,
NOTARY'S SEAL. Notary Public,
New York County (No. 155).

1658

NOTICE OF APPEAL.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOHN B. REYNOLDS, as Sole Executor of the Last Will and Testament, and the Codicil thereto, of Lucy Fayerweather, deceased, Cross-Complainant-Appellant,

1659 *against*

THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN, individually, and as Trustees and Executors of the Last Will and Testament of Daniel B. Fayerweather, deceased, and of the cedicils thereto, The Trustees of Amherst College, The Trustees of Dartmouth College, the Trustees of Hamilton College, The University of Rochester, The President and Trustees of Williams College, The President
1660 and Trustees of Bowdoin College, The Union Theological Seminary in the City of New York, Cornell University, The Adelbert College of the Western Reserve University, The North Western University, The Woman's Hospital in the State of New York, The Mount Sinai Hospital, The Presbyterian Hospital in the City of New York, The Manhattan Eye and Ear

Appeal and Allowance. Equity, No. 6675.

Hospital, St. Luke's Hospital in the City of New York, Wesleyan University at Middletown, Conn., Lafayette College at Easton, Pa., Marietta College, The President and Fellows of Yale College in New Haven, Conn., The Trustees of Columbia College in the City of New York, Emma S. Fayerweather and
1661 Mary W. Achter,
Defendants-Appellees.

The above-named John B. Reynolds, as Sole Executor of the Last Will and Testament, and the Codicil thereto, of Lucy Fayerweather, deceased, conceiving himself aggrieved by the decree entered herein on January 14th, 1901, and by the final decree entered on October 10th, 1902, herein, doth hereby appeal from said decrees to the Supreme Court of the United States, and prays that this his appeal may be allowed ; and that a transcript of the record and proceedings upon which said decrees were made, duly authenticated, may be sent to the said Supreme Court, at the City of Washington, in the
1662 District of Columbia.

Dated New York, October 15th, 1903.

WILLIAM BLAIKIE,
Solicitor for said Appellant,
35 Nassau Street,
New York.

The foregoing appeal is hereby allowed, October 15, 1903, for the review of the questions set forth in the Assignments of Error filed herewith, as well of jurisdiction as otherwise.

E. HENRY LACOMBE,
U. S. C. J.

PROOF OF SERVICE OF APPEAL AND ALLOWANCE.

Service of a copy of the Annexed Appeal and its Allowance is hereby admitted this 16th day of October, 1903.

Solicitor for the Defendants, Bulkley & Vaughan.

Copy received Oct. 17th, 1903.

ROOT, HOWARD, WINTHROP & STIMSON,
Solicitors for Defendant the Trustees of Hamilton College.

1663

SWAYNE & SWAYNE,
Solicitors for the Defendant Lafayette College.

Oct. 17, 1903.

Solicitor for the Defendant University of Rochester.

SCOTT & UPSON,
Solicitors for Defendant Adelbert College of the Western Reserve University.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Solicitors for the Defendant the President

1664 and Trustees of Bowdoin College.

Solicitors for Defendant Wesleyan University at Middletown, Conn.

Solicitors for the Defendant The Woman's Hospital of the State of New York.

DE FOREST BROTHERS,
Solicitors for the Defendant The Presbyterian Hospital in the City of New York.

Solicitor for the Manhattan Eye & Ear Hospital.

Solicitors for Defendants Ritch, Cornell University and Marietta College.

Received on the 17th October.

JAMES L. BISHOP,
Solicitor for the Defendant the Trustees of Amherst College.

1665

PUTNEY, TWOMBLEY & PUTNEY,
Solicitors for the Defendants, President and Trustees of Williams College and the Union Theological Seminary.

Solicitors for the Defendant the Northwestern University.

RUSSELL & HOLMES,
Solicitors for the Defendant the Trustees of Dartmouth College.

Solicitor for the Defendant the President and
1666 Trustees of Yale College in New Haven, Conn.

Solicitors for the Trustees of Columbia College in the City of New York.

HOADLY, LAUTERBACH & JOHNSON
Solicitors for the Mt. Sinai Hospital.

Solicitors for St. Luke's Hospital in the City of New York.

AFFIDAVIT OF SERVICE.

UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOHN B. REYNOLDS, as Sole Executor of the Estate of LUCY FAYERWEATHER, Deceased,
Complainant,

1667 *against*

THOMAS G. RITCH, &c., and others,
Defendants.

In Equity.
No. 6675.

BOROUGH OF MANHATTAN,
City, County and State of New York, } ss.:

FRANK E. SMITH, being duly sworn, says:

I am over twenty-one years, and an attorney-at-law. October 17th, 1903, in said Borough of Manhattan, I served the annexed Appeal and its Allowance upon the defendants, Bulkley & Vaughan, herein, at the office of their attorneys herein, Messrs. Parsons, Shepard & Ogden,
1668 at 52 William street in said Borough, by showing to Albert F. Wright Judge Lacombe's signature to said Appeal and Allowance, delivering to said Wright personally, a copy said Appeal and Allowance and leaving it with him. He then and there told me, and I believe, that said firm were at that time absent from said office, and that he, said Wright, was in charge of it.

October 17th, 1903, at about 10 A. M. in said Borough of Manhattan, I served the annexed Appeal and its Allowance upon the Woman's Hospital, in the State of New York, at the law office of its solicitor herein, William W.

Hoppin, Esq., at 52 William street in said Borough of Manhattan, by showing the signature of Judge Lacombe to the original of said Appeal and Allowance to E. Eliscu, Esq., and by delivering to him personally a copy of said Appeal and Allowance, and leaving it with him. He then and there informed me, and I believe, that said Hoppin was then absent from said office, and that he, said Eliscu, was in charge of it.

1669

October 17th, 1903, I served said Appeal and its Allowance upon the defendants Ritch, Cornell University and Marietta College herein, by showing said original Appeal and Allowance and Judge Lacombe's signature thereto, to C. N. Bovee, Jr., of the firm of Ritch, Woodford, Bovee & Butcher, solicitors for said defendants herein, personally, and by delivering a copy of said Appeal and Allowance to said Bovee personally, and leaving it with him.

October 16th, 1903, I served the annexed Appeal and its Allowance upon the defendants, The Northwestern University herein, by showing said original Appeal and Allowance and Judge Lacombe's signature thereto, to W. B. Greeley, of the law firm of Redding, Kiddle & Greeley, solicitors for said Northwestern University
1670 herein, by delivering a copy of said Appeal and Allowance to said Greeley personally, and leaving it with him.

October 16th, 1903. I served the annexed appeal and its allowance upon the defendant, St. Luke's Hospital in the City of New York, by showing said original appeal and allowance and Judge Lacombe's signature thereto to Mr. Marshall of the law firm of Marshall, Moran & Williams, solicitors for the defendants herein, at their office at 30 Broad street, in said Borough of Manhattan, by delivering a copy of said appeal and its allowance to said Marshall personally and leaving it with him.

AFFIDAVIT OF SERVICE.

October 16th, 1903. I served the annexed appeal and its allowance upon the defendant, The Manhattan Eye and Ear Hospital herein, by showing the said original appeal and allowance, and Judge Lacombe's signature thereto to W. V. Volkel, at the law office of Robert J. Hare Powel, Esq., the solicitor for said defendant herein, and delivering to said Volkel personally, a copy of said appeal and allowance, and leaving it with him at the said office. He then and there told me, and I believe it, that said Powel was at that time absent from, and that he, said
1671 Volkel, was then in charge of said office.

FRANK E. SMITH.

Sworn to before me this 19th day of October, 1903.

L. V. BROOME,
Notary Public (No .155)
New York County.

{ NOTARY'S SEAL. }

BOROUGH OF MANHATTAN, *City, County and State of New York*, } ss. :

FRANK E. SMITH, being further sworn, says: October 16th, 1903, I served the annexed appeal and allowance upon the defendant, the Trustees of Columbia College in the City of New York, by showing said original appeal and allowance, and Judge Lacombe's signature
1672 thereto, to N. M. Burrell, at the office of John McLean Nash, Esq., the solicitor for said defendant, at 63 Wall street, New York, by delivering to said Burrell personally, a copy of said appeal and allowance, and leaving it with him. He then and there told me, and I believe it, that said Mr. Nash was then absent from said office, and that he, said Burrell, was in charge for Mr. Nash during his absence.

FRANK E. SMITH.

Sworn to before me October 19th, 1903.

L. V. BROOME,
Notary Public (No. 155),
New York County.

{ NOTARY'S SEAL. }

AFFIDAVIT OF SERVICE.

U. S. CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF N. Y.

JOHN B. REYNOLDS, as Sole Executor of the Estate of Lucy Fayerweather, deceased, Complainant, *against* THOMAS G. RITCH, &c., and others, Defendants.	**In Equity. No. 6675.**

1673

BOROUGH OF MANHATTAN, *City, County and State of New York,* } ss.:

WILLIAM BLAIKIE, being duly sworn, says: I am over twenty-one years old.

October 17th, 1903, I served the annexed appeal and its allowance upon the defendant, the President and Trustees of Yale College in New Haven, Conn., herein by showing the signature of Judge Lacombe to said appeal and allowance to Mr. Dohrman, at the office of Haley Fiske, Esq., the solicitor for said defendant herein, at No. 1
1674 Madison avenue in the Borough of Manhattan aforesaid, delivering to said Dohrman personally, and leaving with him a copy of said appeal and allowance herein.

Said Dohrman then and there told me, and I believe him, that at that time, said Fiske was in Europe. This was at about twelve noon.

October 17th, 1903, at about 12:45 P. M. I served said appeal and its allowance upon the defendant the Wesleyan University at Middletown Conn. by depositing a copy thereof, enclosed in a sealed wrapper, directed to Messrs. G. G. & F. Reynolds, solicitors for said defendant herein, in their office letter box, at the outer door of their office at No. 16 Court street, Brooklyn, N. Y., and leaving it there,

there being no person in charge of said office at that time and the office—it being Saturday—being closed.

October 17th, 1903, at about 2:25 P. M., I served said appeal and its allowance upon the defendant the University of Rochester herein, by showing the original appeal and allowance and Judge Lacombe's signature thereto, to Seth S. Terry, Esq., solicitor for said defendant herein personally, by delivering a copy thereof to said Terry personally, and leaving it with him at or near No. 80 Broadway, New York.

WILLIAM BLAIKIE.

1675

Sworn to before me this 19th day of October, 1903.

L. V. BROOME,
Notary Public,
New York County (No. 155).

{NOTARY'S SEAL.}

United States of America, ss.:

The President of the United States to Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, individually and as Trustees and Executors of the Last Will and Testament of Daniel B. Fayerweather, deceased, and of the codicils thereto, The Trustees of Amherst College, The Trustees of Dartmouth College, The Trustees of Hamilton College, The University of Rochester,
1676 The President and Trustees of Williams College, The President and Trustees of Bowdoin College, The Union Theological Seminary in the City of New York, Cornell University, The Adelbert College of the Western Reserve University, The North Western University, The Woman's Hospital in the State of New York, The Mount Sinai Hospital, The Presbyterian Hospital in the City of New York, The Manhattan Eye and Ear Hospital, St. Luke's Hospital in the City of New York, Wesleyan University at Middletown, Conn., Lafayette College at Easton, Pa., Marietta College, The President and Fellows of Yale College in New Haven, Conn., The

CITATION.

Trustees of Columbia College in the City of New York, Emma S. Fayerweather and Mary W. Achter.

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the City of Washington, in the District of Columbia, on the 12th day of November, 1903, pursuant to an appeal allowed and filed in the office of the Clerk of the Circuit Court of the United States for the Southern District of New York, wherein John B.
1677 Reynolds, as sole executor of the Last Will and Testament, and of the Codicil thereto, of Lucy Fayerweather, deceased, is appellant, and you and each of you are appellees, to show cause, if any there be, why the decrees in said appeal mentioned, should not be corrected, and speedy justice should not be done the parties in that behalf.

WITNESS the Honorable Melville W. Fuller, Chief Justice of the United States, this 15th day of October, 1903.

E. HENRY LACOMBE,
U. S. Circuit Judge.

1678

Service of a copy of the annexed citation, is hereby admitted, this 16th day of October, 1903.

Solicitors for the defendants Bulkley & Vaughan.

Copy received Oct. 17, 1903.
ROOT, HOWARD WINTHROP & SON,
Solicitors for defendant the Trustees of Hamilton College.

SWAYNE & SWAYNE,
Solicitors for the defendant Lafayette College.
Oct. 17.

Solicitor for the defendant University of Rochester.

SCOTT & UPSON,
Solicitors for the defendant Adelbert College of the Western Reserve University.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Solicitors for the defendants the President and Trustees of Bowdoin College.

1679

Solicitors for defendant Wesleyan University at Middletown, Conn.

Solicitors for the defendant the Woman's Hospital of the State of New York.

DEFOREST BROTHERS,
Solicitors for the defendant Presbyterian Hospital in the City of New York.

Solicitors for the Manhattan Eye and Ear Hospital.

1680

Solicitors for defendants Ritch, Cornell University, and Marietta College.

Received on the 17th of October.

JAMES L. BISHOP,
Solicitor for the defendant the Trustees of Amherst College.

PROOF OF SERVICE.

PUTNEY, TWOMBLEY & PUTNEY,
Solicitors for the defendants President and Trustees of Williams College and the Union Theological Seminary.

Solicitors for the defendant Northwestern University.

RUSSELL & HOLMES,
Solicitors for the defendant the Trustees of Dart-
1681 mouth College.

Solicitors for the defendant the President and Trustees of Yale College in New Haven, Conn.

Solicitors for the Trustees of Columbia College in the City of New York.

HOADLEY, LAUTERBACH & JOHNSON,
Solicitors for the Mt. Sinai Hospital.

Solicitors for St. Luke's Hospital in the City of New York.

1682

AFFIDAVIT OF SERVICE.

U. S. CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOHN B REYNOLDS, as Sole Executor of the Estate of Lucy Fayerweather, deceased,
Complainant,

1683 *against*

THOMAS G. RITCH, and others,
Defendants.

BOROUGH OF MANHATTAN,
City, County and State of New York, } ss.:

FRANK E. SMITH, being duly sworn, says: I am over twenty-one years old, and am an attorney-at-law.

October 17th, 1903, in said Borough of Manhattan, I served the annexed Citation, upon Messrs. Parsons, Shepard & Ogden, solicitors for the defendants Bulkley & Vaughan, herein, by showing to Albert F. Wright, Judge Lacombe's signature to said original Citation, and
1684 delivering to said Wright personally, a copy of said Citation, at the law office of said said firm of Messrs. Parsons Shepard & Ogden, at 52 William street, New York, and leaving it with said Wright. He then and there informed me, and I believe that said firm were at that time absent from said office, and that he was in charge of it.

October 17th, 1903, at about 10 A. M., in said Borough of Manhattan, I served the annexed Citation upon Wm. W. Hoppin, Esq., solicitor for the defendant, the Woman's Hospital in the State of New York, herein, by showing to E. Eliscu, Judge Lacombe's signature to said original Citation, by delivering a copy of said Citation to him personally, and leaving it with him at the office of

said Hoppin, at 52 William street, in said Borough of Manhattan. Said Eliscu then and there informed me, and I believe that said Hoppin was then absent from said office, and that said Eliscu was in charge of it.

At their office, at 18 Wall street, New York, October 17, 1903, at about 10 A. M., I served the annexed Citation upon Messrs. Ritch, Woodford, Bovee & Butcher, solicitors for the defendants Ritch, Cornell University and Marietta College herein, by delivering a copy of said Citation to C. N. Bovee, Jr., a member of said firm, personally,
1685 and leaving it with him. And by showing to him at the same time Judge Lacombe's signature to said original Citation.

October 17th, 1903, at their office at 38 Park Row, in said Borough of Manhattan, I served the annexed Citation upon the defendants, The Northwestern University herein, by showing to W. B. Greeley of the firm of Redding, Kiddle & Greeley, solicitors for said defendant herein, said original Citation, and the signature of Judge Lacombe thereto, and delivering to said Greeley a copy thereof.

October 16th, 1903, at their office, at 30 Broad street, in said Borough of Manhattan, I served the annexed Citation upon Messrs. Marshall, Moran & Williams, as solicitors for the defendant St. Luke's Hospital in the City of New York herein, by showing to Mr. Marshall of said firm, the signature of Judge Lacombe to said original Cita-
1686 tion, and by delivering to said Marshall personally and leaving with him a copy of said Citation.

October 16th, 1903, at his office, at 120 Broadway, in said Borough of Manhattan, I served the annexed citation upon the defendant, the Manhattan Eye and Ear Hospital, by showing to W. V. Volkel, at the office of R. J. H. Powel aforesaid, said Powel being the attorney for said defendant herein, Judge Lacombe's signature to said original citation, and by delivering a copy of said citation to said Volkel personally, and leaving it with him.

He then and there informed me, and I believe that said Powel was then absent from said office, and that he, said Volkel, was in charge of it.

FRANK E. SMITH.

Sworn to before me this 19th day of October, 1903.

L. V. BROOME,
Notary Public,
New York County, No. 155.

{NOTARY'S SEAL.}

1687

BOROUGH OF MANHATTAN, *City, County and State of New York.* } *ss.*:

FRANK E. SMITH, being further sworn, says: October 16th, 1903, I served the annexed citation upon the defendant, the Trustees of Columbia College in the City of New York, by showing said original citation, and Judge Lacombe's signature thereto, to N. M. Burrell, at the office of John McLean Nash, the solicitor for said defendant herein at 63 Wall street, New York, by delivering to said Burrell personally, a copy of said citation and leaving it with him. He then and there told me, and I believe him, that said Mr. Nash was then absent from said office, and that he, said Burrell, was in charge for Mr. Nash
1688 during his absence.

FRANK E. SMITH.

Sworn to before me, October 19th, 1903.

L. V. BROOME,
Notary Public,
New York County, No. 155.

{NOTARY'S SEAL.}

AFFIDAVIT OF SERVICE.

U. S. CIRCUIT COURT,

FOR THE SOUTHERN DISTRICT OF N. Y.

JOHN B. REYNOLDS, as Sole Executor of the Estate of Lucy Fayerweather, deceased,
Complainant,

1689 *against*

THOMAS G. RITCH, &c., and Others,
Defendants.

In Equity. No. 6675.

BOROUGH OF MANHATTAN, *City, County and State of New York*, } ss. :

WILLIAM BLAIKIE, being duly sworn, says: I am over twenty-one years old, October 17th, 1903, I served the annexed citation upon the defendant, the President and Trustees of Yale College in New Haven, Conn., by showing the signature of Judge Lacombe to said citation, to Mr. Dohrman, at the office of Haley Fiske, Esq., the
1670 solicitor for said defendant herein, at No. 1 Madison ave., in the Borough of Manhattan aforesaid, delivering to said Dohrman personally, and leaving with him, a copy of said citation herein. Said Dohrman then and there told me, and I believe him, that at that time, said Fiske was in Europe. This was at about 12 noon.

October 17, 1903, at about 12:45 P. M., I served said citation upon the defendant, the Wesleyan University at Middletown, Conn., by depositing a copy thereof, enclosed in a sealed wrapper, directed to Messrs. G. G. & F. Reynolds, solicitors for said defendant herein, in their office letter-box, at the outer door of their office, at No. 16 Court st.,

Brooklyn, N. Y., and leaving it there, there being no person in charge of said office at that time. The office—it being Saturday—was closed.

October 17, 1903, at about 2:25 P. M., I served said citation upon the defendant, The University of Rochester, herein, by showing the original citation, and Judge Lacombe's signature thereto, to Seth S. Terry, Esq., solicitor for said defendant herein, personally, by delivering a copy thereof to said Terry personally and leaving it with him, at or near No. 80 Broadway, New York.

1691 WM. BLAIKIE.

Sworn to before me this 19th day of October, 1903.

L. V. BROOME,
NOTARY'S SEAL. Notary Public,
New York County, No. 155.

1692

BOND ON APPEAL.

U. S. CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER, and another, Complainants, *against* THOMAS G. RITCH, &c., and others, Defendants.	**In Equity. No. 6675.**

UNITED STATES OF AMERICA, *Southern District of New York*, } ss.:

KNOW ALL MEN BY THESE PRESENTS that we, Emma S. Fayerweather and Mary W. Achter, as principals, and John A. Irwin and Joseph Laux, as sureties, are held and firmly bound unto Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, individually and as Trustees and Executors of the Last Will and Testament of Daniel B. Fayerweather, deceased, and of the Codicils thereto; to the Trustees of Amherst College; the Trustees of Dartmouth College; the Trustees of Hamilton College; the University of Rochester; the President and Trustees of Williams College; the President and Trustees of Bowdoin College; the Union Theological Seminary in the City of New York; Cornell University; the Adelbert College of the Western Reserve University; the Northwestern University; Woman's Hospital in the State of New York; the Mt. Sinai Hospital; the Presbyterian Hospital, in the City of New York; the Manhattan Eye and Ear Hospital; St. Luke's Hospital in the City of New York; Wesleyan University, at Middletown, Conn.; Lafayette College, at Easton, Pa.; Marietta College; the President and Fellows of Yale College, in New Haven Conn.; the Trustees of Columbia College, in the City of New York, and John B. Reynolds as sole Executor of the last

will and codicils of Lucy Fayerweather, deceased, in the sum of Five Hundred dollars ($500) lawful money of the United States of America, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 29th day of May, 1903.

The condition of the above obligation is such, that, WHEREAS, in the Circuit Court of the United States, for the Southern District of New York, in a suit pending in said Court, between Emma S. Fayerweather and Mary W. Achter, as Complainants, against John B. Reynolds, as Executor of the last will of Lucy Fayerweather, deceased, and said obligees, defendants, and wherein said John B. Reynolds, as such executor, was Cross-complainant, against said Complainants, and said obligees, a final decree was rendered by said Court upon the tenth day of October, 1902, against said principal obligors, from which decree they have taken jointly and severally an appeal to the Supreme Court of the United States:

Now, if the said appellants shall prosecute their said appeal to effect, and answer all damages and costs, if they fail to make their appeals good, then the above obligation to be void, otherwise to remain in full force and effect.

(Signed) EMMA S. FAYERWEATHER, [SEAL.]
By John B. Reynolds, Atty. in fact.

MARY W. ACHTER, [SEAL.]
By John B. Reynolds, Atty. in fact.

J. A. IRWIN, [SEAL.]

JOSEPH LAUX, [SEAL.]

In presence of WM. BLAIKIE as to all.

CITY, COUNTY AND STATE OF NEW YORK, } ss.:
Borough of Manhattan, }

Upon this 1st day of June, 1903, before me came the above-named John B. Reynolds, to me known, who being by me duly sworn, did depose and say, that he executed

the foregoing instrument as the act and deed of Emma S. Fayerweather and Mary W. Achter, therein described, by virtue of a power of attorney, duly executed by the said Emma S. Fayerweather and Mary W. Achter, thereunto duly thereby authorized.

(Signed) GEORGE B. HAYES, [SEAL.]
Notary Public (221),
New York Co.

CITY, COUNTY AND STATE OF NEW YORK, } ss.:
Borough of Manhattan, }

Upon this 1st day of June, 1903, before me personally came John B. Reynolds, to me known and known to me to be the individual described in and who executed the above instrument, and he duly acknowledged the execution thereof, individually and as attorney in fact for Emma S. Fayerweather and Mary W. Achter, for the uses and purposes therein mentioned.

(Signed) GEORGE B. HAYES, [SEAL.]
Notary Public (No. 221),
N. Y. Co.

CITY, COUNTY AND STATE OF NEW YORK, } ss.:
Borough of Manhattan, }

JOHN A. IRWIN, being duly sworn, deposes and says: I reside in the Borough of Manhattan, in the City of New York, and am a householder therein, and am worth the sum of One thousand dollars over and above all property exempt from sale or execution.

(Signed) J. A. IRWIN.

Sworn to before me this 29th day of December, 1902.

(Signed) L. V. BROOME,
[NOTARY'S SEAL.] Notary Public (155),
N. Y. County.

BOND ON APPEAL.

CITY, COUNTY AND STATE OF NEW YORK, } ss.:
Borough of Manhattan, }

JOSEPH LAUX, being duly sworn, deposes and says: I reside in the Borough of Manhattan, in the City of New York, and am a freeholder therein, and am worth the sum of One thousand dollars over and above all property exempt by law from levy and sale under an execution.

(Signed) JOSEPH LAUX.

Sworn to before me this 29th day of May, 1903.

(Signed) GEORGE B. HAYES,
Notary Public,
N. Y. Co.

On this 29th day of May, 1903, in the Borough of Manhattan, in the City, County and State of New York, before me, a Notary Public in and for the County of New York, personally appeared the above-named John A. Irwin, of the said Borough of Manhattan, to me known and known to me to be the individual described in and who executed the foregoing bond, and he then and there acknowledged that he had executed the said bond for the uses and purposes therein expressed.

(Signed) L. V. BROOME,
Notary Public (155),
N. Y. County.

[NOTARY'S SEAL.]

On this 29th day of May, 1903, in the Borough of Manhattan, in the City, County and State of New York, before me a Notary Public in and for the County of New York, personally appeared the above-named Joseph Laux, of the said Borough of Manhattan, to me known and known to me to be the individual described in and who executed the foregoing bond, and he then and there acknowledged that he had executed the said bond for the uses and purposes therein expressed.

(Signed) GEORGE B. HAYES,
[SEAL.] Notary Public,
New York Co.

[Endorsed].—United States Circuit Court for the Southern District of New York.—Emma S. Fayerweather and another, complainants, against Thomas G. Ritch and others, defendants (in Equity, No. 6675).—Bond upon Appeal.—Approved by E. Henry Lacombe, U. S. Circuit Judge, New York, Oct. 15th, 1903.—U. S. Circuit Court.—Filed Oct. 15, 1903.—Southern District Court, New York.

JOHN A. SHIELDS,
Clerk.

U. S. CIRCUIT COURT,

FOR THE SOUTHERN DISTRICT OF N. Y.

JOHN B. REYNOLDS, as Sole Executor of the Estate of Lucy Fayerweather, deceased, Complainant, *against* THOMAS G. RITCH, &c., and others, Defendants.	In Equity. No. 6675.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

KNOW ALL MEN BY THESE PRESENTS, that I, John B. Reynolds, individually, and as Sole Executor of the Last Will and Codicil of Lucy Fayerweather, deceased, as principal, and John A. Irwin and Joseph Laux, as sureties, are held and firmly bound unto Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, individually and as Trustees and Executors of the Last Will and Testament of

Daniel B. Fayerweather, deceased, and of the codicils thereto; to the Trustees of Amherst College; the Trustees of Dartmouth College; the Trustees of Hamilton College; the University of Rochester; the President and Trustees of Williams College; the President and Trustees of Bowdoin College; the Union Theological Seminary in the City of New York; Cornell University; the Adelbert College of the Western Reserve University; the North Western University; Woman's Hospital in the State of New York; the Mt. Sinai Hospital; the Presbyterian Hospital in the City of New York; the Manhattan Eye and Ear Hospital; St. Luke's Hospital in the City of New York; Wesleyan University, at Middletown, Conn; Lafayette College, at Easton, Pa.; Marietta College; the President and Fellows of Yale College, in New Haven, Conn.; the Trustees of Columbia College, in the City of New York, and Emma S. Fayerweather and Mary W. Achter, in the sum of Five hundred Dollars ($500), lawful money of the United States of America, for the payment of which well and truly to be made, we bind ourselves and each of us, his heirs, executors and administrators, and jointly and severally, firmly by these presents.

Sealed with my seal, and dated this 4th day of June, 1903.

The condition of the above obligation is such, that WHEREAS, in the Circuit Court of the United States, for the Southern District of New York, in a suit pending in said Court, between Emma S. Fayerweather and Mary W. Achter, as complainants, against John B. Reynolds, as Executor of the last will of Lucy Fayerweather, deceased, and said obligees, defendants, and wherein said John B. Reynolds, as such Executor, was Cross-Complainant, against said Complainants, and said obligees, a final decree was rendered by said Court upon the tenth day of October, 1902, against said principal obligor, from which decree he has taken an appeal to the Supreme Court of the United States.

Now, if the said appellant John B. Reynolds shall

prosecute his said appeal to effect, and answer all damages and costs, if he fails to make his said appeal good, then the above obligation to be void, otherwise to remain in full force and effect.

(Signed) JOHN B. REYNOLDS. [SEAL.]
" J. A. IRWIN. [SEAL.]
" JOSEPH LAUX. [SEAL.]

In Presence of
WILLIAM BLAIKIE,
as to all three.

CITY, COUNTY AND STATE OF NEW YORK, } ss.:
Borough of Manhattan. }

Upon this 4th day of June, 1903, before me personally came the above named John B. Reynolds, to me known, and known to me to be the individual described in, and who executed the above instrument, and he duly acknowledged that he executed the same for the uses and purposes therein expressed.

L. V. BROOME,
[SEAL.] Notary Public (155),
New York County.

CITY, COUNTY AND STATE OF NEW YORK, } ss.:
Borough of Manhattan, }

JOHN A. IRWIN, being duly sworn, deposes and says: I reside in the Borough of Manhattan, in the City of New York, and am a householder therein, and am worth the sum of One thousand dollars over and above all property exempt by law from levy and sale under an execution.

J. A. IRWIN.

Sworn to before me this }
6th day of June, 1903. }

L. V. BROOME,
Notary Public,
New York County.

BOND ON APPEAL.

CITY, COUNTY AND STATE OF NEW YORK, } ss.:
Borough of ,

JOSEPH LAUX, being duly sworn, deposes and says: I reside in the Borough of Manhattan, in the City of New York, and am a freeholder therein, and am worth the sum of One thousand dollars over and above all property exempt by law from levy and sale under an execution.

JOSEPH LAUX.

Sworn to before me this }
4th day of June, 1903. }

L. V. BROOME,
[SEAL.] Notary Public (155),
New York County.

On this 6th day of June, 1903, in the Borough of Manhattan, City, County and State of New York, before me, a Notary Public in and for the County of New York, personally appeared the above-named John A. Irwin, of the said Borough of Manhattan, to me known and known to me to be the individual described in and who executed the foregoing bond, and he then and there acknowledged that he had executed the said bond for the uses and purposes therein expressed.

L. V. BROOME,
Notary Public,
New York County.

On this 4th day of June, 1903, in the Borough of Manhattan, in the City, County and State of New York, before me, a Notary Public in and for the County of New York, personally appeared the above-named Joseph Laux, of the said Borough of Manhattan, to me known and known to me to be the individual described in and who executed the foregoing bond, and he then and there acknowledged that he had executed the said bond for the uses and purposes therein expressed.

L. V. BROOME,
[SEAL.] Notary Public (155),
New York County.

BOND ON APPEAL.

[Endorsed]—United States Circuit Court, for the Southern District of N. Y.—John B. Reynolds, as Sole Executor of the Estate of Lucy Fayerweather, deceased, Complainant, against Thomas G. Ritch, &c., and others, Defendants (In Equity, No. 6675).—Bond upon Appeal.—Approved by E. Henry Lacombe, U. S. Circuit Judge, New York, Oct. 15th, 1903.—Endorsed: U. S. Circuit Court, Filed Oct 15, 1903, Southern District New York, John A. Shields, Clerk.